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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1977

(BEGINNING OF TERM)

OCTOBER 3, 1977, THROUGH FEBRUARY 22, 1978

TOGETHER WITH IN-VACATION DISMISSALS AND OPINIONS
OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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Erratum

430 U. S. 964, No. 76-1172: In lieu of "370 Mass. ——" substitute "371 Mass. 773".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.

OFFICERS OF THE COURT

GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.*
BETTY J. CLOWERS, Acting Librarian.

*Mr. Jacobs was appointed Librarian effective January 22, 1978. See *post*, p. 1042.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.*:

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

TUESDAY, OCTOBER 11, 1977

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

Mr. Solicitor General McCree presented the Honorable Griffin B. Bell, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded by the Clerk.

DEATH OF MR. KIRKS

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, NOVEMBER 2, 1977

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

THE CHIEF JUSTICE said:

Before hearing argument this morning I have an announcement for the records of the Court. Major General Rowland F. Kirks, retired, long a member of the Bar of this Court and Director of the Administrative Office of the United States Courts since 1970, died early this morning. General Kirks was appointed by this Court as Director seven years ago and in that position he has given outstanding and dedicated service to the Judiciary.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE CLARK*

MONDAY, JANUARY 23, 1978

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS.

THE CHIEF JUSTICE said:

The Court is in Special Session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our late Brother, Mr. Justice Tom Clark. The Solicitor General is recognized for the purpose of presenting the Resolutions adopted by the Bar.

Mr. Solicitor General McCree addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting of the members of the Bar of the Supreme Court this afternoon resolutions memorializing our regard for the Honorable Tom C. Clark and expressing our profound sorrow at his death were unanimously adopted.

The resolutions unanimously adopted are as follows:

The members of the Bar of the Supreme Court of the United States have met today to record our respect, admiration, and

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*Mr. Justice Clark, who retired from active service on the Court June 12, 1967 (388 U. S. v; 389 U. S. IV), died in New York, N. Y., on June 13, 1977 (432 U. S. v). Services were held at Restland Memorial Park in Dallas, Tex., on June 16, 1977, where interment followed. Memorial services were held at the National Presbyterian Church, Washington, D. C., on June 22, 1977.

affection for Tom C. Clark, who served with distinction as Associate Justice for 18 years, from 1949 until his retirement in 1967, and who thereafter served the public interest with undiminished vigor until the very day of his death on June 13, 1977.

Tom C. Clark lived the law successfully, and to the fullest: as a private practitioner, state prosecutor, federal attorney, Assistant Attorney General, Attorney General, Associate Justice of the Supreme Court, and, finally, as an active senior judge and a roving ambassador of justice dedicated to improving the American legal system.

While easygoing and casual in his ways, he left a monumental record of achievement. His legacy includes not only his contributions to the annals of the Supreme Court, but ranges far beyond the letter of the law to the improved functioning of the machinery of justice and its greater appreciation by judges, administrators, practitioners, and people throughout the United States.

Above all, Tom C. Clark gave of himself, with selfless diligence and devotion, with a genuine care for people's needs, and with a warm and friendly manner which brought out the best in others and evoked their loyalty and affection. Never arrogant, pompous, or sanctimonious, always modest and unassuming, *his* diaries are writ large in the hearts of all those who were touched by his radiance over the years.

I

Justice Clark came to his understanding of the legal process, and his easy rapport with its practitioners, from his own experiences in reaching the legal summit.

An outgoing Texan, in manner and spirit, he was born in Dallas on September 23, 1899. He received his legal education at the University of Texas, graduating in 1922. In 1924, he married Mary Ramsey, the lovely daughter of a Justice of the Supreme Court of Texas. Mary Clark remained his lifelong companion, whose love and devotion he credited as the inspiration for all his accomplishments in later years.

Over 15 years at the Bar of Texas, he became a successful legal practitioner. During part of this time he worked in his father's family law firm, Clark & Clark. Later he served as Civil District Attorney in his home county for six years. His personal charm and gift for dealing with people propelled him into local politics, which paved the way for his move to Washington in 1937 at the start of the second Roosevelt administration.

In January 1937, Tom Clark reported for work at the Department of Justice. There he tried wage and hour, war fraud, espionage, and antitrust cases. His competence, personality, and diligence made for his rapid rise in the Justice Department. As young Ben Tillman, Pitchfork Ben Tillman's son, who traveled with Tom Clark all over the South trying wage and hour cases, once said: "A man who had invoices spread out all over his hotel bed at night—a man who works like that deserves to succeed."

Succeed he did. He worked with the famous trust buster Thurman Arnold, heading the Antitrust Division's West Coast Regional Offices, where he acquired a zeal for antitrust enforcement. Antitrust law became a favorite source of his legal learning, as revealed in his many antitrust opinions for the Court. In 1943, he became Assistant Attorney General, first in charge of the Antitrust Division and then in charge of the Criminal Division. There he prosecuted many major war fraud cases referred to the Justice Department by a junior Senator from Missouri, Harry Truman, who headed a Senate investigating committee—a man whom he later came to call "the best client of my life."

In 1945, Tom C. Clark was appointed by President Truman as Attorney General of the United States, the first head of the Justice Department to come up through the ranks. A vigorous Attorney General, he pressed for active antitrust enforcement, and personally argued key cases before the Supreme Court. A Texan, he filed the first *amicus curiae* brief by an Attorney General in support of civil rights, challenging racially restrictive covenants, culminating in the 1948 landmark *Shelley* v.

Kraemer decision.[1] At a time of domestic insecurity and strife, dramatized by congressional investigations, he implemented a loyalty program for federal employees, and promulgated the first Attorney General's list of subversive political organizations, followed by the prosecutions of the American Communist Party leaders under the Smith Act. His concern with internal security matters carried forward into some of the judicial conflicts which would divide the Court in the years to come.

As Attorney General, his reverence for the Supreme Court, as an institution, was profound. He believed that the Attorney General had a symbolic duty to appear personally before the Court from time to time to present oral argument in landmark cases. At the opening of every Term of Court, Attorney General Clark and his top assistants, dressed in ceremonial cutaways, would show their respect for the Court by their personal attendance.

II

Appointed by President Truman as Associate Justice of the Supreme Court, Tom C. Clark took his oath of office on August 24, 1949. His service over the next 18 years spanned the eras of the Vinson and the Warren Courts.

In his early years on the Court, Tom Clark often followed the leadership of Chief Justice Vinson. He cast not a single dissenting vote in his first term. At first, he regularly voted with the Truman appointees, disparaged by the Court's critics as the Four Horsemen, to uphold the constitutionality of the government's internal security and loyalty programs.

But at crucial junctures, Justice Clark declared his judicial independence. In the famous *Steel Seizure Case* [2] in 1952, Tom Clark not only voted against his "best client," the President who had appointed him, but split with Chief Justice Vinson who would have upheld President Truman's extraordinary exercise of executive authority.

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[1] 334 U. S. 1 (1948). See Remarks of Justice Marshall on Justice Clark at 63 A. B. A. J. 984, 985 (1977).

[2] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

While convinced of the government's rights of self-defense against the Communist conspiracy, Justice Clark perceived constitutional limits on those powers. In 1952, he wrote the Court's unanimous opinion holding unconstitutional an Oklahoma loyalty oath forcing state employees to swear that for five years they had not belonged to any organization listed as "subversive" or a "communist front" by the Attorney General of the United States.[3] In the Court's view, membership alone, possibly without knowing the character of the organization, did not itself prove disloyalty. Such a statutory restraint on "individual freedom of movement is to stifle the flow of democratic expression and controversy . . . ."

Similarly, Justice Clark joined the majority opinion invalidating state sedition laws under the Federal Supremacy Clause.[4] He wrote the majority opinion invalidating a New York City charter provision requiring dismissal, without notice and hearing, of a municipal employee who claimed the Fifth Amendment privilege against self-incrimination in the course of an investigation concerning his official conduct.[5]

Despite his firm belief in strong law enforcement, he authored the landmark opinion in *Mapp* v. *Ohio*, extending the rule excluding unconstitutionally seized evidence to serve as a deterrent to illegal law enforcement activities by state officials.[6]

As for the rights of racial minorities, Justice Clark was committed to ensuring all citizens' rights to equal justice under the law. Notwithstanding his Texan roots, his 1953 opinion striking down the Texas "Jaybird" white primary[7] gave wide

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[3] *Wieman* v. *Updegraff*, 344 U. S. 183 (1952).

[4] *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956).

[5] *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956).

[6] 367 U. S. 643 (1961). See also *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966) (massive, prejudicial publicity concerning murder prosecution violated Due Process Clause); *Estes* v. *Texas*, 381 U. S. 532 (1965) (televising of courtroom proceedings in criminal trial over the defendant's objection constituted denial of due process).

[7] *Terry* v. *Adams*, 345 U. S. 461 (1953).

sweep to the concept of "state action" to bar evasion of the constitutional prohibition on discriminatory activities against racial minorities.

Although a deeply religious man, Justice Clark wrote the controversial 1963 opinion that outlawed Bible reading exercises in the public schools as prohibited by the Constitution's ban on the "establishment" of religion.[8]

History will render its verdict on the work of the Vinson and Warren Courts, as the pendulum moves toward its ultimate balance. But the annals of the Supreme Court plainly record that Justice Clark steadily grew taller in office, and kept making important judicial contributions to the Court that he served with great diligence and devotion.

Transcending Justice Clark's role in the Supreme Court's decisional functions was his tireless effort to improve the American system of justice—a mission which he carried out for years above and beyond his Supreme Court judicial duties. To that task he devoted his boundless energy in his final career, which began upon his retirement from the Court in 1967 to avoid any appearance of conflict arising out of President Johnson's appointment of his son Ramsey Clark as Attorney General.

At the peak of his judicial powers, Justice Clark retired from the Supreme Court on June 12, 1967, with the blessings of Chief Justice Warren, who remarked at the Court's farewell ceremonies that "he has been a great companion for us, and he departs with the affection of every member of the Court."

III

As he gained confidence and stature in his judicial responsibilities, Justice Clark devoted more and more of his energies to

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[8] *Abington School Dist.* v. *Schempp*, 374 U. S. 203 (1963). See also *United States* v. *Seeger*, 380 U. S. 163 (1965) (interpreting conscientious objector statute to extend to any sincere belief occupying "a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption").

his consuming passion—the improvement of our Nation's legal institutions.

To him, the law was far more than rhetoric or abstractions. He believed that the law remained an empty promise unless the institutions that administered it were able to deliver justice to all the people efficiently and effectively, and unless the people themselves appreciated and understood the role of their legal institutions in a democratic society.

His warm personality and easy charm, gracing a missionary zeal to improve the administration of justice, ideally suited him to his task. He was at home among judges and lawyers everywhere; he addressed hundreds of bar associations; he participated in countless committees, seminars, and programs. His ready smile, his colorful bow ties, his corny automatic alarm watch became legendary at conventions, banquets, and meetings everywhere. He drove himself untiringly; he worked on nights and weekends; he mobilized funds and people in support of his causes.

His ceaseless travels crisscrossed the country to spread the gospel, and to lend the Supreme Court's prestige to noble causes. He spoke to citizens' conferences, Boy Scout meetings, students in grade and high schools throughout the Nation, to broaden their understanding of the American system of justice and the role of law in a democratic society.

Justice Clark was a fervent advocate of the merit selection of judges, a cause for which he provided institutional leadership as Chairman of the Board of the American Judicature Society.

A champion of upgrading professional discipline and ethics, Justice Clark was Chairman of a Special Committee of the American Bar Association whose recommendations for strong self-disciplinary machinery sought to enhance public confidence in the integrity of the legal process.

But his prime preoccupation was the improvement of the judicial system and its administration. In 1956, he became Chairman of the American Bar Association's Section of Judicial Administration, which served as a platform for the coordina-

tion of the federal and state judiciary in joint efforts to improve the machinery of justice. He met with state chief justices to identify their problems and work toward effective solutions. He organized state trial judges in common efforts to modernize courts, culminating in the ABA's National Conference of State Trial Judges in 1958. In 1961, the Joint Committee for the Effective Administration of Justice unified and mobilized the efforts of the leading national organizations working toward the improvement of the quality of justice. He served as the Joint Committee's chairman, driving force, and guiding light. The Joint Committee organized state and regional training seminars, which highlighted the need for an enlarged and permanent program of continuing education for state judges. Under Justice Clark's leadership, the National Judicial College (formerly the National College of the State Judiciary) was born. The College has issued certificates of completion to more than 7,500 judges, and has expanded its programs to include appellate court judges, as well as administrative law and special court judges.

After his retirement from the Court in 1967, his activities never slowed. As a senior judge, he sat on the Courts of Appeals in all eleven Circuits. He even held trial in district court.

Justice Clark also became the first Director of the Federal Judicial Center, which pioneered judicial training programs everywhere. Chief Justice Warren aptly remarked: "It is almost as though his entire career had been preparing him for the mission of the Center." [9]

He was truly a leader of the legal profession. In 1962, he received the American Bar Association's Gold Medal, the ABA's highest award for meritorious service. As Justice Powell once said: "It is likely that Mr. Justice Clark was known personally and admired by more lawyers, law professors, and judges than

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[9] Address before the American Law Institute, Washington, D. C., May 21, 1968.

any justice in the history of the Supreme Court of the United States." [10]

His monumental achievements have made the law a living reality, by elevating the quality of justice through better performance by judges, practitioners, and every participant in the legal process.

IV

Above all, in the final reckoning, underneath the robe and the high office, was Tom Clark, the gentle man who cared, and who loved people.

As his son Ramsey observed in his memorable eulogy for his father, "the best man [he had] ever known":

> "People come first. He wants to do things that are good for people. He knows it will be possible only with reason, tolerance, gentleness, and perseverance. A wholly constructive human being, a man of giant and gentle strength; a man who works from morning to night—not for work, or as an end in itself. Meaningful work, well done. . . .
> ". . . He always has a good word. Around him let no evil be spoken of any person."

His efforts were not reserved for the high and mighty. He did not condescend to people; he was everyone's friend. At the Justice Department, he promoted the interests of career employees and civil servants. He pushed for the desegregation of bar associations. At the Court, he befriended every secretary, messenger, guard, and barber, and was interested in their families and their problems. He personally wrote out and answered every note and Christmas card. He remembered birthdays and anniversaries. He responded to thank-you notes with thank-you notes. His handwritten cards, signed T. C. C., were received and treasured by thousands who knew that he cared.

His chambers at the Court became the home of his judicial family. Alice O'Donnell, whom he graciously called "Miss

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[10] 63 A. B. A. J. 984, 985 (1977).

Alice," was a perennially youthful fount of efficient cheer for judges, lawyers, law clerks, and wayfaring strangers. Oscar was the Court's most pampered messenger. Every Clark law clerk became a Clark family member, who shared Justice Clark's confidences and soul-searching in the decisional process. He did not summon his law clerks, but always visited with them. One of them recalls, typically, being welcomed by the Justice to his new duties with the words: "You treat me as your father, and I'll treat you as my son. If you ever need anything, you just whistle." Justice Clark's law clerks joined the Clark family for Thanksgiving dinners. He drove by their homes in his battered Oldsmobile, visited their wives at the hospital, and godfathered their children. They responded with a fierce loyalty and affection.

The Clark law clerks have recently founded a Justice Tom C. Clark Memorial Judicial Fellowship, to honor and continue Justice Clark's work as a "living memorial" for the improvement of justice.

As he walks into the eternal sunset, the friendly Texan who grew taller and taller over the years will remain among us forever as a good man and as a gentle spirit.

Wherefore, it is accordingly

Resolved, That we, the Bar of the Supreme Court of the United States, express our profound sorrow at the passing of Associate Justice Tom C. Clark, declare our deep gratitude for his great contributions to the legal system of the United States, and record our appreciation for his personal warmth and generosity, which have touched countless members of our profession and of our people with a lasting glow of affection for this good man whose life has graced and inspired all of us; and it is further

Resolved, That the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.[11]

[11] The foregoing Resolutions are proposed by the Committee on Resolutions, which consisted of the following members: Hon. William O. Douglas,

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General and I recognize the Attorney General of the United States.

Mr. Attorney General Bell addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of the Court met today to honor the memory of Tom C. Clark, Associate Justice of the Supreme Court from 1949 to 1967.

Mr. Justice Clark sat on this Court for 18 of the most challenging and turbulent years of the law in modern America. It was a time when this Court found itself at the vortex of nearly every social upheaval of its day, and few citizens were untouched in their daily lives by its decisions. In 1949, when Tom Clark took his seat, segregation was the law of the land; defendants in state courts could be convicted on evidence seized with no regard for the protection of the Fourth Amendment; schoolchildren participated in daily religious observances; indigent citizens were regularly denied rights available to those who could afford to pay; States could ban the commercial expression of views they found "sacrilegious"; citizens who espoused unpopular political beliefs found themselves distant from the sanctuary of the law.

When Mr. Justice Clark retired in 1967, these wrongs had been banished by a Court that found them unable to survive the bright and healing light of the Constitution. Time after time, Mr. Justice Clark spoke for this Court as it set aright these injustices.[1]

Hon. Stanley Reed, Hon. Irving R. Kaufman, Hon. Irving L. Goldberg, Hon. Thomas E. Fairchild, Hon. James R. Browning, Hon. Ivan Lee Holt, Jr., Hon. William H. Erickson, William T. Gossett, Esq., Bert H. Early, Esq., Ernest Rubenstein, Esq., Larry E. Temple, Esq., Dean Dorothy Nelson, Dean Werdner Page Keeton, Robert McKay, Esq., Robert Ash, Esq., James Warren, Esq., Fred Vinson, Jr., Esq., Clark M. Clifford, Esq., Charles Alan Wright, Esq., and Frederick M. Rowe, Esq., Chairman.

[1] See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961);

The years of Tom Clark's tenure were truly years of revolution in American life—a revolution brought about, not by force, but by the utter and irrevocable shift in fundamental concepts of justice. During those years, Mr. Justice Clark was a sturdy linchpin of this Court, a conciliatory and centripetal force.

He was a man whose humanity and common sense and deep concern for his fellow citizen made him a natural spokesman for the Court in those decisions which touched so many common people. He calmly and forthrightly expressed his dissent when he believed the Court had gone too far or too fast, but it is a measure of his achievement that he was never consistently far from the center of the Court in those often difficult years. Perhaps we might more truly say that the Court never went far in any direction if Tom Clark was not there. The keel of a great sailing vessel is not always visible as it exerts its steadying force, and if occasionally the ship must heel or pitch in its mighty attempts to follow its course in difficult waters, the keel will keep it steady. Of Mr. Justice Clark, it may be said that he was the keel of this Court in difficult waters—sturdy and steady and indispensable to the integrity of the voyage.

In every area of the law, Mr. Justice Clark's opinions vividly demonstrate his deep belief that the legitimacy of democratic government—indeed, its very survival—depends upon its keeping faith with the people. "Nothing can destroy a government more quickly," he wrote for the Court in *Mapp* v. *Ohio*,[2] "than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

When he was Attorney General, Tom Clark promulgated the Attorney General's list of subversive organizations; he

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Heart of Atlanta Motel, Inc. v. *United States*, 379 U. S. 241 (1964); *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Abington School Dist.* v. *Schempp*, 374 U. S. 203 (1963); *Smith* v. *Bennett*, 365 U. S. 708 (1961); *Anders* v. *California*, 386 U. S. 738 (1967); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Slochower* v. *Board of Education*, 350 U. S. 551 (1956); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952).

[2] 367 U. S. 643, 659 (1961).

remained genuinely concerned over the possibility that disloyal Americans might bring harm to this country.[3] But this concern, however heartfelt, could not move him to retreat from his steadfast loyalty to the due process of law. In striking down a loyalty oath that the Court thought too sweeping, Mr. Justice Clark reminded us all: "Democratic government is not powerless to meet this threat [of disloyalty], but it must do so without infringing the freedoms that are the ultimate values of all democratic living." [4]

It was fitting then, that Mr. Justice Clark articulated for the Court—and for the Nation—a principle so simple and so just that it has become one of the foundations of public law: that once a government agency or official has set forth regulations, it is not at liberty to disregard them.[5] Few concepts are more necessary to the integrity of government which Tom Clark so constantly strove to preserve.

Yet Mr. Justice Clark was no foe of strong, effective government. In his opinions for the Court one finds a realistic recognition, perhaps nurtured by his experience as Assistant Attorney General in charge of the Antitrust Division and of the Criminal Division, and later as Attorney General, that the Executive Branch must be able to meet new challenges with new solutions.[6] But he was a constant foe of irresponsible government, and seldom did his opinions for this Court uphold new governmental approaches to problems without also carefully setting down limitations to insure that those powers would be lawfully and justly exercised.[7] And he was ever

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[3] *E. g., Aptheker* v. *Secretary of State,* 378 U. S. 500, 524–529 (1964) (Clark, J., dissenting).

[4] *Wieman* v. *Updegraff, supra,* at 188.

[5] *U. S. ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954).

[6] See, *e. g., Goldblatt* v. *Town of Hempstead,* 369 U. S. 590 (1962); *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U. S. 357 (1965); *Federal Trade Commission* v. *Simplicity Pattern Co.,* 360 U. S. 55 (1959).

[7] See, *e. g., Holland* v. *United States,* 348 U. S. 121 (1954); *Federal Trade Commission* v. *National Lead Co.,* 352 U. S. 419 (1957); see also *Wisconsin* v. *Federal Power Commission,* 373 U. S. 294, 315–333 (1963) (Clark, J., dissenting).

ready to extend the hand of humaneness to correct government action when he perceived that it was being wielded arrogantly or without compassion.[8]

In doing so, Mr. Justice Clark was unfailingly sensitive to "the imperative of judicial integrity," [9] recognizing that judicial integrity is fundamental to due process of law and thus to the integrity of government itself. He demonstrated that sensitivity in writing for the Court in one of its earliest encounters of what has proved to be a nettlesome and recurring problem—the conflict between the right to a fair trial and the demands of a free press. One has only to read his description of the intrusion of the press in *Estes* v. *Texas* [10] and *Sheppard* v. *Maxwell* [11] to realize, as he did, how fragile judicial integrity can be, and how closely its preservation depends upon the protection of the rights of the defendant. Every defendant, said Mr. Justice Clark for the Court, is entitled to "judicial serenity and calm," [12] free of prejudicial publicity and disruption of the jury's deliberative process:

> "Due process [he wrote] requires that the accused receive a trial by an impartial jury free from outside influences. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." [13]

Mr. Justice Clark understood well that no government could keep faith with its citizens without vigorously guaranteeing

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[8] See, *e. g.*, *Hatahley* v. *United States*, 351 U. S. 173 (1956); *Cox* v. *Roth*, 348 U. S. 207 (1955).

[9] *Mapp* v. *Ohio*, *supra*, at 659, quoting *Elkins* v. *United States*, 364 U. S. 206, 222 (1960).

[10] 381 U. S. 532 (1965).

[11] 384 U. S. 333 (1966).

[12] *Estes* v. *Texas*, 381 U. S., at 536; *Sheppard* v. *Maxwell*, 384 U. S., at 355.

[13] *Id.*, at 362–363. Cf. *Rideau* v. *Louisiana*, 373 U. S. 723, 727–733 (1963) (Clark, J., dissenting).

those citizens their rights under the law. Throughout his career on this Court, he unequivocally expressed this Court's dedication to the advancement of civil rights for all Americans. In his first Term, he voted to reverse the conviction of a Negro who had been indicted by a grand jury from which the only Negro known to the white jury commissioners was excused because he was too old to serve. Said Mr. Justice Clark, with characteristic directness: "[The commissioners'] responsibility was to learn whether there were persons among the Negroes they did not know who were qualified and available for service." [14]

His opinion for the Court in *Burton* v. *Wilmington Parking Authority*,[15] as every judge and lawyer knows, gave new meaning to the concept of "state action" at a crucial time in our history, when the Fourteenth Amendment was called forth as the law's cutting edge in the fight against racial discrimination in America. *Burton* served notice to the States and to all people that public property was no place for private discrimination.

And Mr. Justice Clark again spoke for the Court in the seminal cases of *Heart of Atlanta Motel, Inc.* v. *United States* [16] and *Katzenbach* v. *McClung*,[17] the companion cases that upheld the Civil Rights Act of 1964 in its prohibition of discrimination in public accommodations and demonstrated unmistakably to the Nation this Court's commitment to a "broad and sweeping" [18] reading of the authority of Congress under the Commerce Clause to combat discrimination.

Tom Clark also firmly believed that law and order are the "wellsprings of democracy," [19] and he reminded us that "[g]oals, no matter how laudable, pursued by mobocracy in

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[14] *Cassell* v. *Texas*, 339 U. S. 282, 298 (1950) (Clark, J., concurring).

[15] 365 U. S. 715 (1961).

[16] 379 U. S. 241 (1964).

[17] 379 U. S. 294 (1964).

[18] *Id.*, at 305. See also *Hamm* v. *Rock Hill*, 379 U. S. 306 (1964).

[19] *Chapman* v. *United States*, 365 U. S. 610, 623 (1961) (Clark, J., dissenting); see *Fay* v. *Noia*, 372 U. S. 391, 447 (1963) (Clark, J., dissenting).

the end must always lead to further restraints of free expression." *Cox* v. *Louisiana*, 379 U. S. 559, 589 (1965) (Clark, J., dissenting).

Tom Clark was a true populist, trusting almost without limit the goodness of the American people he so deeply loved, and ever suspicious of those who sought to abuse that goodness for narrow gain. His vision of the law and his fellow man where seldom in conflict, for, as he once wrote: "There is no war between the Constitution and common sense." [20]

His opinions, like the man himself, were straightforward—never redundant, never prolix. His style was plain and clear, his language free of pretense or obfuscation. He admitted doubt where there was doubt, yet explained the Court's reasoning carefully, as if writing not merely for his fellow lawyers but for all his fellow citizens. Only a great man can explain so effectively his wisdom without the need to flaunt it. Tom Clark was such a man.

Indeed, Tom Clark was an uncommon man. Most of us are privileged to have one and perhaps two careers. He had four. He was a lawyer in private practice for a time, Assistant Attorney General and Attorney General for a time, and a Justice of the Supreme Court for a time. But upon retirement from the Court, he began another career, certainly an important one. He became the foremost expert in and teacher of judicial administration in America. It was in judicial administration that he touched the lives of many young judges. I was among those. He sent me to the Division of Judicial Administration in the American Bar to help. I served under him at the Federal Judicial Center. I worked closely with him in many endeavors.

He was a warm friend. I miss him very much. I miss his wise counsel. One of my first acts as Attorney General was to have his portrait moved into the conference room just outside my office. I then had him for lunch to seek his advice and to show him the new location of his portrait. In typical

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[20] *Mapp* v. *Ohio*, 367 U. S., at 657.

modesty, he thanked me for taking him, as he said, out of the basement. His modest manner was given meaning in little ways. For example, he spent the night in our home in Atlanta and my wife was shocked to find that he had made his bed before leaving.

On the death of President Lincoln, Tolstoy, the Russian writer and philosopher, described him as being a great man, and he said that his greatness was in his life's having been rooted in four eternal principles, humanity, truth, justice, and pity. Sandburg recalled this tribute of Tolstoy in his chapter on the Lincoln eulogies, which chapter is entitled "A tree is best measured when it's down." As we measure Mr. Justice Clark, we can say that his life too was rooted in humanity, truth, justice, and pity.

May it please this honorable Court:

In the name of the lawyers of this Nation, and particularly the Bar of this Court, I respectfully request that the Resolutions presented to you in memory of the late Justice Tom C. Clark be accepted by you, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General, Mr. Solicitor General, the Court thanks you for your presentation here today in memory of our late Brother, Mr. Justice Tom Clark. We ask you to convey to the members of the Committee on Resolutions our deep appreciation for those most appropriate Resolutions.

Your motion that they be made part of the permanent record of the Court is granted.

The 101 men who have come to this Court since 1790 have each had much in common because, of course, they were all lawyers; but each of them has also had some special and unique attributes. With some of them these special attributes were known before they came here, and perhaps explain why they were selected. With others the uniqueness and special

attributes emerged after coming to the Bench. And the Resolutions presented by the Solicitor General and the Attorney General have marked the growth of our late Brother, Tom Clark, in all of his activities.

As they have pointed out, Tom Clark had not one career, but four, each of which was readily identified. These Resolutions have spoken eloquently of his work as a practicing lawyer, first in Texas and then in the Department of Justice. His long tenure in that Department culminating in his service as Attorney General gave him an insight into the workings of Government surpassed by no man who ever came to this Court.

Certainly no Justice who sat here had a greater understanding of the complexities of the twentieth century problems of governing a diverse population of 200 million people. And, as has been said, one can see this rich background and broad experience reflected in the practical common sense of his opinions.

A professional career reaching the high post of Attorney General is ordinarily enough to fulfill the desires and satisfy the ambitions of any American lawyer; but, as we know, it was only a foundation for another career as a Justice of this Court. During his 18 years here, as the Solicitor General has noted, he participated in some of the most crucial decisions, not only of our time but in the entire history of the Court.

There is a cliché that lawyers who are appointed to the Bench from Government service, especially from long service such as he had, have become infected with a pro-Government bias. Tom Clark of course did serve in the Department of Justice a long time, but his opinions as a Justice of this Court and later while sitting on the Courts of Appeals in all of the circuits reveal that old cliché for precisely what it is. No one can find any evidence of a pro-Government bias in Justice Clark's judicial work.

His service as a Justice has now been eloquently and abundantly covered in the Resolution of the Bar, but, as the Solicitor General noted, retirement from the Court after 18 years,

covering this extraordinary period in American history, and something that would ordinarily be the capping of a great career was the beginning of yet another one, the third one, which, happily for this country, covered another decade, literally up to the day of his death.

Long before his retirement from this Bench, Tom Clark had become the vital link between the Supreme Court and the legal profession, a link which is indispensable to the effective functioning of the system of justice in this country. Crucial as is the matter of maintaining communication with the organized bar, the Justices of this Court, at least for the past 25 or 30 years, have been faced with such heavy burdens and constantly increasing dockets that it has been very difficult for them to maintain the kind of contact they would like to have with the practicing profession. Not so for Tom Clark. Somehow he managed to do both.

But once freed from the heavy burdens of serving as a Justice, he expanded his efforts for the improvement of the judicial system. He has been described as both ambassador and missionary, and, indeed, he was both. No problem of the courts, federal or state, escaped his notice or escaped his powers of persuasion to marshal support for solutions.

Two particular activities deserve comment, even at the risk of some repetition. One year after his retirement from this Court, the Federal Judicial Center was created by an Act of Congress, and it was created to address the very problems that had engaged his attention and energies for so many years. The governing body of that Center wisely selected him as the first Director. It was a case of a man and a position made for each other; the need, the time, and the man coincided.

Even though his tenure as Director was relatively brief, due to the statutory age limit fixed by the Congress, his contribution was enormous, and all out of proportion to the length of his tenure as measured by a calendar.

Even as recently as 1968, when the Center was founded, federal judges were far from unanimous as to the need for a research and development program on the problems of the

courts. And many were even less sympathetic to the idea of continuing legal education for judges. But Tom Clark before that time, as both the Solicitor General and the Attorney General have noted, was instrumental in the development of the National College of the State Judiciary, as it was known at that time, and he knew the value of that institution and of its educational programs for judges. And that, of course, gave him an enormously valuable foundation to supply the leadership that was needed to launch the new Federal Judicial Center, where continuing education and special training seminars for judges would be a major factor.

Equally important as his knowledge and experience in how to go about his new task was the credibility that he gave to this new enterprise. I recall one very senior federal judge, a man of large standing and reputation in the federal judiciary, who, among a group of judges, expressed skepticism about the need for the Federal Judicial Center, but then he ended up by saying: "If Tom Clark is for it, it must be sound, and I'm for it." And that was the attitude of the skeptics, shared by many judges, in 1968.

His term as Director of the Center terminated very shortly after I came to this office and when, by statute, I automatically became Chairman of the Center Board. I note that I share an experience with the Attorney General, for on the day the Senate confirmed my nomination I called Tom Clark and asked if he would meet with me and several others for breakfast on June 24, the morning after I was scheduled to take the oath of office in this Chamber. The purpose was to discuss problems, programs, and projects for the future. His typical response was: "Why not sooner?"

I then explained that I thought since he was still in the office of Director, and that until July 23 I was merely a circuit judge who was Chief Justice-designate, it would be wiser to defer any meetings on that subject until I was formally in office. He agreed. And on the morning of June 24, less than 24 hours after I took office, we met for breakfast in his chambers with several other judges and leaders in public adminis-

tration. That was the beginning, or, rather, I should say the beginning of an enlargement of a cooperation with Tom Clark which I had experienced for a good many years before that in the programs and activities that both of us felt were so crucial to the future of the judicial system, in both federal and state courts.

From that day forward, literally to the Saturday preceding his death when I met him in the hall of the Court, and visited on some common problems, my communication with Tom Clark was continuous. There was no problem that reached my desk on which he was not prepared and willing to shoulder responsibilities at my request. Apart from taking specific assignments on programs and projects of the Center, and of the Judicial Conference, I consulted with him frequently informally, at lunch in my chambers or over a cup of tea in his chambers.

When the matter of the selection of his successor was before us, as it was at the time I came here, I consulted with him and followed his recommendation as to the appointment of Judge Alfred Murrah as his successor.

And then, once relieved of his duties as Director, in September 1969, Tom Clark resumed the regular sittings in the Courts of Appeals, in special courts, and the District Courts that have already been referred to. No one in the history of this Court, after retirement as an Associate Justice, has ever engaged in such constant and steady judicial activity, as well as continuing his missionary work.

At this Court's request, he undertook difficult assignments as a Special Master on cases where not only his rich legal background, but particularly his abundant common sense and his great powers of persuasion made it desirable to call upon him.

During the years from 1969 until his death, there was never any occasion in which he did not respond instantly to any request we made of him to take on special assignments, either at the Center or sitting on other courts or as a Special Master. But, at the same time, his sensitivity was such that he was

careful not to interpose his views on his successor, Judge Murrah, as Director of the Federal Judicial Center.

Before I close, I would like to mention just a few personal aspects of his temperament and personality. In the years that I was seeing him frequently, from 1969 until last year, and our friendship had gone back to 1953 when I first began to make appearances in this Court, I noted one thing about him that always puzzled me. He gave the impression of being an unhurried and unharried person. Yet when we came to know him well, we learned that he was about as unhurried as a dynamo, and he gave off the same kind of energy that a dynamo produces. He influenced all those he worked with, and it bears repeating that no one can remember any judge or Justice of this country who had a wider personal acquaintance with so many federal and state judges and bar leaders than did Tom Clark. And these were warm, personal, and lasting relationships, which, quite frankly, he exploited to the fullest to carry out programs of improvement for the state and federal courts.

A further aspect was his deep humility, even as he furnished this dynamic and innovative leadership. And by humility, I mean a willingness to listen to others even while they were being persuaded, sometimes unknown to them, by his gentle but very firm advocacy.

I recall one story told me by the wife of a judge in Minnesota on the occasion when Tom Clark came to the city of St. Paul, my home city, to dedicate a memorial to Roscoe Pound, who had made his famous speech on justice, in the State Capitol in 1906.

For some reason the escort judge was late in meeting Tom—or, more likely, Tom was early in arriving at the appointed place. The wife of the Minnesota judge was awaiting her husband at the time, and she told me that she approached Justice Clark with some apprehension and apologized for her husband's delay and, being conscious that there was some protocol, but not quite sure what it was, she said: "I have never met a Justice of the Supreme Court before; how do I address you?"

With that infectious grin that we all know so well and will never forget, he replied immediately: "Just call me Tom."

This was not an isolated or unusual reaction from Tom Clark, for he was known not to hundreds but literally thousands of state and federal judges and lawyers throughout this country, and except for some occasions where formality was imperative, I doubt that he was ever addressed in any other way than "Just call me Tom."

So we will remember him, along with his remarkable contributions to the improvement of justice, as a bundle of quiet energy, a dynamo in both ideas and execution of those ideas, all of it concealed under the appearance of a relaxed Texas cowboy.

Before I close, I must add a word as to the part Mary Clark, his wife, played in his remarkable career. I should say remarkable careers, for we have all said there were several.

As with her husband, literally thousands of judges and lawyers and law teachers in this country knew her as "Mary." Her contribution to his life and career was very great. And, in a far lesser way, of course, we share the loss she and her family have experienced.

I speak for all members of this Court, and I will undertake to speak for thousands of state and federal judges and lawyers of the United States, in this final salute to a man who has done so much to make the judicial systems work, to make justice meet the needs of our times in all of our courts.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1977

NEW HAMPSHIRE *v.* MAINE

ON JOINT MOTION FOR ENTRY OF FINAL DECREE

No. 64, Orig. Decided June 14, 1976—Decree entered October 3, 1977

Joint motion for the entry of a final decree is granted, and a final decree is entered.

Opinion reported: 426 U. S. 363.

DECREE

The joint motion for entry of a final decree is granted.

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Report of the Special Master is hereby approved, and the motion for entry of judgment by consent of plaintiff and defendant is granted.

2. This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor in the Isles of Shoals.

3. The Order of the King in Council of April 9, 1740, in pertinent part, provided:

> "And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua

> Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments And That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Massachusets Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same . . . ."

4. The terms "Middle of the River" and "Middle of the Harbour," as used in the above-quoted Order, mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

5. The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point, New Hampshire, and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cove, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

6. The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43°02′42.5″ North and longitude 70°42′06″ West. Said point has a computed bearing of 194°44′47.47″ true and a computed distance of 1,554.45 metres (1,700 yards) from the Whaleback Lighthouse, No. 19, USCG–158, whose position is latitude

43°03′31.213″ North and longitude 70°41′48.515″ West (reference National Geodetic Survey).

7. The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973. The position of this point is latitude 42°58′51.6″ North and longitude 70°37′17.5″ West as scaled from the above-described chart.

8. The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42°58′55″ North and longitude 70°37′39.5″ West. Said point has a computed bearing of 394°08′52.81″ true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 20, USCG–158, whose position is latitude 42°58′01.710″ North and longitude 70°37′25.590″ West (reference National Geodetic Survey).

9. The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (6) and (8) above has been determined on the basis of the "special circumstances" exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U. S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two States in their colonial grants and charters.

10. The lateral marine boundary line between New Hampshire and Maine connecting the channel termination points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

11. The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139°20′27.22″ true.

12. The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel termination

point proceeds toward Piscataqua River channel termination point on a computed bearing of 319°17′25.43″ true.

13. All positions in the preceding paragraphs are referred to the North American Datum of 1927.

14. The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973, filed with the Motion for Entry of Judgment by Consent.

15. The State of Maine, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the area adjudged to her by this decree.

16. The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL. *v.* RICHARDS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 76–1418. Decided October 11, 1977

Arlington County, Va., zoning ordinance prohibiting automobile commuters from parking in designated residential neighborhoods and providing for free parking permits for residents of such neighborhoods *held* not to violate the Equal Protection Clause of the Fourteenth Amendment. The distinction drawn between residents and nonresidents of a neighborhood is not invidious and rationally promotes the ordinance's stated legitimate objectives of reducing air pollution and other adverse consequences of automobile commuting, and of enhancing the quality of life in residential areas such as by reducing noise and traffic hazards.

Certiorari granted; 217 Va. 645, 231 S. E. 2d 231, vacated and remanded.

PER CURIAM.

The motion of D. C. Federation of Civic Associations et al. for leave to file a brief as *amici curiae* and the petition for a writ of certiorari are granted.

To stem the flow of traffic from commercial and industrial districts into adjoining residential neighborhoods, Arlington County, Va., adopted zoning ordinance § 29D. The ordinance directs the County Manager to determine those residential areas especially crowded with parked cars from outside the neighborhood.[1] Free parking permits are then issued to residents of the designated areas for their own vehicles, to persons doing business with residents there, and to some visitors. To

[1] This condition is met when "the average number of vehicles [operated by persons whose destination is a commercial or industrial district] is in excess of 25% of the number of parking spaces on such streets and the total number of spaces actually occupied by any vehicles exceeds 75% of the number of spaces on such streets on the weekdays of any month . . . ."

park an automobile without a permit in a restricted area between 8 a. m. and 5 p. m. on weekdays is a misdemeanor.

Acting under the ordinance, the County Manager designated a restricted area in Aurora Highlands, a residential neighborhood near a large commercial and office complex. Commuters who worked in this complex and had regularly parked in the area sued in the Circuit Court of Arlington County to enjoin the enforcement of the ordinance on state and federal constitutional grounds. The Virginia Supreme Court ultimately held that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment.[2]

As stated in its preamble, the Arlington ordinance is intended

> "to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses . . . ; to protect those districts from polluted air, excessive noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County."

Conceding the legitimacy of these goals, the Virginia Supreme Court found that the ordinance's discrimination between residents and nonresidents "bears no reasonable relation to [the

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[2] Although the state trial court found the ordinance invalid under the State and Federal Constitutions, the State Supreme Court rested its decision solely on the Equal Protection Clause of the Fourteenth Amendment.

regulation's] stated objectives," and, therefore, that "the ordinance on its face offends the equal protection guarantee of the 14th Amendment." 217 Va. 645, 651, 231 S. E. 2d 231, 235. We disagree.

To reduce air pollution and other environmental effects of automobile commuting, a community reasonably may restrict on-street parking available to commuters, thus encouraging reliance on car pools and mass transit. The same goal is served by assuring convenient parking to residents who leave their cars at home during the day. A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter. By definition, discrimination against nonresidents would inhere in such restrictions.[3]

The Constitution does not outlaw these social and environmental objectives, nor does it presume distinctions between residents and nonresidents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington's rationally promote the regulation's objectives. See *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 8 (1974). On its face, the Arlington ordinance meets this test.

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[3] Restrictions on nonresident parking have sparked considerable litigation. See, *e. g.*, *South Terminial Corp.* v. *EPA*, 504 F. 2d 646, 671–676 (CA1 1974) (restrictions upheld); *Friends of the Earth* v. *EPA*, 499 F. 2d 1118, 1125 (CA2 1974) (restrictions upheld); *Commonwealth* v. *Petralia*, — Mass. —, 362 N. E. 2d 513 (1977) (restrictions upheld); *State* v. *Whisman*, 24 Ohio Misc. 59, 263 N. E. 2d 411 (Ct. Com. Pleas, 1970) (restrictions invalidated); *Georgetown Assn. of Businessmen* v. *District of Columbia*, Civ. No. 7242–76 (D. C. Super. Ct., Aug. 9, 1976) (restrictions preliminarily enjoined). The United States as *amicus curiae* notes that parking restrictions to discourage automobile commuting have been recommended by the Environmental Protection Agency to implement the Clean Air Amendments of 1970. See 38 Fed. Reg. 30629 (1973).

Accordingly, the judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL would grant the petition for certiorari and set the case for oral argument.

Per Curiam

SOUTHERN OVERLYING CARRIER CHAPTER OF THE CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 76–1526. Decided October 11, 1977

Appeal challenging the constitutionality of appellee Commission's promulgation of certain dump truck rate tariffs is dismissed without prejudice, where after appellants' filing of jurisdictional statement appellee reopened the proceedings and is conducting additional hearings that may remove the basis for, or significantly modify, appellants' challenge.

Appeal dismissed.

PER CURIAM.

In this appeal from a judgment of the Supreme Court of California, appellants challenge the constitutionality of the promulgation by appellee of certain rate tariffs applicable to dump truck carriers operating in California. They contend essentially that the tariffs violate their rights to due process and equal protection guaranteed by the Fourteenth Amendment because appellee issued them on the basis of findings unsupported by any evidence in the record. We have been informed by the parties that subsequent to the filing of the jurisdictional statement with this Court appellee reopened its proceedings at appellants' request and is conducting additional evidentiary hearings concerning the contested regulations. These hearings may remove the basis for, or significantly alter the nature of, appellants' constitutional attack. Consequently, we dismiss the appeal without prejudice to appellants' raising of any appropriate federal claims following the completion of

the additional proceedings. See *Boston & M. R. Co.* v. *United States*, 358 U. S. 68 (1958).

So ordered.

MR. JUSTICE REHNQUIST, dissenting.

Since this appeal is properly before us, prior practice indicates that we must either dispose of it on the merits or advance some principled reason for not doing so. The statutory distinction, drawn by Congress, between certiorari and appeal would seem to require no less. While this Court's dismissal of the appeal in *Boston & M. R. Co.* v. *United States*, 358 U. S. 68 (1958), may be justified as an exercise of our supervisory power over the lower federal courts, a proper respect for the independence of the state systems requires that as a general rule we deal with appeals from their judgments on the merits.

Since Art. III of the Constitution limits our jurisdiction to cases and controversies, we have occasionally dismissed a state appeal as moot, *In re Sarner*, 361 U. S. 233 (1960); *Castellano* v. *Commission of Investigation*, 361 U. S. 7 (1959), and we may be compelled to do so even though a state court has found a justiciable controversy under its own law, see *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974). But there has been no suggestion of mootness here.

Indeed, all there is here is an apparent preference on the part of the Court not to decide the merits of this case just now. This is not, in my opinion, a defensible exception to the principle that we must treat appeals on their merits. I conclude that the federal constitutional claims rejected by the Supreme Court of California have no merit.* Accordingly, I

*I am satisfied that, for purposes of our jurisdiction under 28 U. S. C. § 1257, the judgment of the Supreme Court of California is final. That judgment, denying appellants' petition for review, has finally rejected their claim that the commission proceedings were constitutionally defective. That court has not exercised any "latent power . . . to reopen or revise

would dismiss the appeal for want of a substantial federal question. If other constitutional claims arise out of the reopened proceedings, they should be presented in an appeal from a subsequent final judgment.

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its judgment." *Market St. R. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 551 (1945). I fail to see how the subsequent actions of the parties can disturb the finality of that judgment. Nor does the Court suggest otherwise.

GENERAL ATOMIC CO. *v.* FELTER, JUDGE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 76-1640. Decided October 31, 1977

A state-court injunction restraining a party to a suit in that court from filing or prosecuting in federal court actions relating to the subject matter of the state-court suit *held* directly to conflict with *Donovan* v. *Dallas*, 377 U. S. 408, and the Supremacy Clause of the Constitution. It is not within the power of state courts to bar litigants from filing or prosecuting *in personam* actions in the federal courts, regardless of whether jurisdiction has already attached in the federal suit or whether the federal litigation is prospective.

Certiorari granted; 90 N. M. 120, 560 P. 2d 541, reversed and remanded.

PER CURIAM.

The petition for a writ of certiorari is granted.

General Atomic Co. (GAC) challenges the validity of an injunction issued by a New Mexico state court restraining it from filing and prosecuting actions against United Nuclear Corp. (UNC) in federal court. We reverse because under *Donovan* v. *Dallas*, 377 U. S. 408 (1964), it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts.

The state-court injunction was issued in connection with one of several lawsuits arising from contracts entered into by UNC and various utility companies providing for the supply by UNC of uranium. GAC subsequently succeeded to UNC's rights and obligations under the utility contracts and, pursuant to a 1973 agreement, UNC became obligated to supply GAC with uranium required under the utility contracts. As the result of a more than fivefold increase in the price of uranium between 1973 and mid-1975, UNC stopped delivery of the uranium and in August 1975 filed a declaratory judgment action in the District Court of Santa Fe County, N. M.,

against GAC and its constituent partners seeking to avoid its obligations under the uranium supply contract.[1] In January 1976, GAC filed an interpleader complaint in the United States District Court for the District of New Mexico against UNC and four utilities seeking determinations binding on all parties as to their respective rights and obligations under its 1973 uranium supply agreement with UNC and its contracts to supply uranium to the utilities. The District Court dismissed the interpleader action on motion of all defendants on March 2, 1976, because of the lack of subject-matter jurisdiction.[2] This dismissal, however, did not conclude the federal-court litigation. By early March 1976, the utilities had brought the following three federal proceedings against GAC: (1) *Indiana & Michigan Electric Co.* (*I&M*) v. *GAC* (an action for damages and specific performance filed in the Southern District of New York); (2) *Commonwealth Edison Co.* v. *GAC* (an action to compel arbitration filed in the Northern District of Illinois); (3) *Duke Power Co.* v. *GAC* (a demand for arbitration filed in the Western District of North Carolina).

On March 15, 1976, UNC, after being warned by I&M that GAC might attempt to implead it in the Southern District of New York action, obtained *ex parte* from the Santa Fe court a

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[1] After one of the defendants removed the entire case to the United States District Court for the District of New Mexico under 28 U. S. C. § 1441 (c), UNC on December 31, 1975, took a voluntary nonsuit as of right pursuant to Fed. Rule Civ. Proc. 41 (a) (1) (i). The same day UNC instituted a new action virtually identical to the previous one, except that it named only GAC as a defendant.

[2] The Tenth Circuit affirmed the dismissal on April 8, 1977. *General Atomic Co.* v. *Duke Power Co.*, 553 F. 2d 53. On January 23, 1976, Gulf Oil Corp., one of GAC's constituent partners, had filed a declaratory judgment action in the United States District Court for the District of New Mexico concerning the validity of a release by UNC of certain claims against it. The action was dismissed on September 29, 1976, on the ground that the issue presented could be decided in the litigation pending in the Santa Fe court.

temporary order restraining GAC from " 'instituting suit or filing a third-party complaint against [UNC].' " [3] On April 2, 1976, after a hearing, the Santa Fe court issued a preliminary injunction broadly restraining GAC from filing or prosecuting any original, third-party, or arbitration actions relating to the subject matter of the Santa Fe lawsuit or including UNC as a party in any actions.[4] Two actions previously filed in New Mexico federal court were exempted from the injunction. The New Mexico Supreme Court granted an alternative writ of prohibition on April 14, 1976, staying the enforcement of the injunction. Immediately after oral argument, on June 16, 1976, however, the court, without opinion, quashed the writ as improvidently granted. We subsequently granted GAC's petition for certiorari, vacated the judgment of the New Mexico Supreme Court, and remanded the cause to that court to consider whether its judgment was based upon federal or state grounds, or both. 429 U. S. 973 (1976).

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[3] Pet. for Cert. 9–10. UNC had originally applied for a temporary restraining order on January 19, 1976, in the Santa Fe court to prevent GAC from instituting any additional suits against UNC. This motion was denied.

[4] "IT IS THEREFORE ORDERED that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms." App. to Pet. for Cert. 3a–4a.

Upon remand, the New Mexico Supreme Court issued an opinion [5] reaffirming its prior judgment and sustaining the injunction on the ground that its issuance was within the inherent equity jurisdiction of the Santa Fe court and was not prohibited by *Donovan* v. *Dallas, supra.* It thought that *Donovan* is not applicable "where a party is currently proceeding in federal court and where any further federal action would be based upon the same issues and events for the purpose of harassment," [6] and because the Santa Fe court's injunction, unlike that adjudicated in *Donovan,* "does not directly or indirectly affect any proceeding in the district court or appellate courts of the United States where jurisdiction has attached." [7] We conclude that the New Mexico Supreme Court's interpretation of *Donovan* is untenable and that the injunction is in direct conflict with that decision and the Supremacy Clause of the Constitution.

In *Donovan* v. *Dallas, supra,* a plaintiff class sought an injunction against construction of an airport runway and issuance of municipal bonds for that purpose. After losing in state court and exhausting their appeals, many of the named plaintiffs together with a group of new plaintiffs filed an action in United States District Court raising issues substantially identical to those already litigated in the state action and seeking similar relief. The city of Dallas moved to dismiss the federal action and, as the result of a favorable judgment in the Texas Supreme Court, obtained an injunction from the Texas Court of Civil Appeals prohibiting all members of the original class from further prosecution of the pending federal action *and* from " 'filing or instituting . . . any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds . . . .' "

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[5] 90 N. M. 120, 560 P. 2d 541 (1977).

[6] *Id.,* at 123, 560 P. 2d, at 544.

[7] *Id.,* at 124, 560 P. 2d, at 545. This statement is not factually accurate. See n. 11, *infra.*

377 U. S., at 410. When the District Court granted the city's motion to dismiss following the issuance of the injunction, some of the plaintiffs took an appeal and others filed a second federal action seeking to enjoin Texas state courts from enforcing the injunction. Subsequently, the Texas Court of Civil Appeals found in contempt both the plaintiffs who had appealed and those who had filed the second federal action. We reviewed the convictions of both sets of plaintiffs and held the injunction to be invalid because "state courts are completely without power to restrain federal-court proceedings in *in personam* actions . . . ." *Id.*, at 413. Our holding was premised on the fact that the right to litigate in federal court is granted by Congress and, consequently, "cannot be taken away by the State." *Ibid.*

The New Mexico Supreme Court clearly erred in concluding that *Donovan* precludes state courts only from enjoining litigants from proceeding further with federal suits in which jurisdiction has already attached at the time of the issuance of the injunction but permits state-court injunctions against additional suits in federal court. In *Donovan,* the Texas Supreme Court not only ordered an injunction against further prosecution of the then-pending federal case but, because "[t]here is indication in the history of this matter that it has reached the point of vexatious and harassing litigation," also authorized the Court of Civil Appeals to enjoin the filing of additional suits if it concluded that such suits "may be filed." [8] The injunction then issued by the Court of Civil Appeals forbade the filing of any new federal suits as well as further proceedings in pending actions; and the ensuing contempt judgments punished both the continued prosecution of the pending federal action and the filing of the additional suit in federal court.[9] We reversed the judgment of the Texas

[8] *Dallas* v. *Dixon,* 365 S. W. 2d 919, 927 (1963).

[9] 377 U. S., at 410–411; *Dallas* v. *Brown,* 368 S. W. 2d 240 (Tex. Civ. App. 1963).

Supreme Court authorizing the injunction and also vacated all the contempt judgments. It is therefore clear from *Donovan* that the rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective.

We also reject the New Mexico Supreme Court's attempt to distinguish *Donovan* on the ground that GAC was currently proceeding in federal court [10] and that any additional suits would be for the purpose of harassment and therefore enjoinable. In authorizing an injunction against further federal proceedings, the Texas Supreme Court expressly recognized the indication of "vexatious and harassing litigation." Indeed, *Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings. It involved a suit filed in federal court after the issuance of a final state-court judgment deciding the principal claims pressed in the federal action adversely to the federal plaintiffs. Moreover, as the *Donovan* opinion pointed out, the pendency of the federal action had the effect of rendering the state-court judgment ineffective, because Texas law provided that the bonds could not be issued while litigation challenging their validity was pending. We nevertheless overturned the state-court injunction.

There is even less basis for the injunction in this case. Here there is no final state-court judgment, since UNC's original action against GAC in the Santa Fe court has not yet been tried. In addition, GAC's opportunity to fairly litigate the various claims arising from this complex action would be substantially prejudiced if the injunction were allowed to

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[10] The New Mexico Supreme Court apparently ignored the fact that both of the federal actions exempted from the injunction had been dismissed long before the issuance of its opinion. Indeed, the interpleader action was dismissed prior to the issuance of the injunction. See *supra*, at 13, and n. 2.

stand. What the New Mexico Supreme Court has described as "harassment" is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits and federal arbitration proceedings brought against it by the utilities.[11] This, of course, is something which GAC has every right to attempt to do under Fed. Rule Civ. Proc. 14 and the Federal Arbitration Act.[12] The right to pursue federal remedies and take

[11] As a result of the injunction, GAC was even prevented from impleading UNC in the Southern District of New York action instituted by I&M against GAC prior to its issuance. GAC did subsequently succeed in obtaining the dismissal of this action pursuant to Fed. Rule Civ. Proc. 19 on the ground that UNC was a necessary party which could not be joined because of the injunction, but only at the price of surrendering its right to litigate its disputes with I&M in a federal forum. *Indiana & Michigan Electric Co.* v. *Gulf Oil Corp.*, 76 Civ. 881 (SDNY Jan. 5, 1977). The injunction has also prevented GAC from asserting claims against UNC under the arbitration provision of the 1973 uranium supply agreement in the pending arbitration proceeding instituted against GAC and UNC by Commonwealth Edison prior to its issuance, even though the District Court granted Commonwealth's demand for arbitration and the Seventh Circuit has affirmed. *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 400 F. Supp. 888 (ND Ill. 1975), aff'd, 541 F. 2d 1263 (1976). In addition, the Western District of North Carolina federal court has refused to stay arbitration between Duke and GAC in a proceeding also instituted prior to the injunction, despite GAC's contention that UNC was an indispensable party to any such arbitration proceeding which it was prevented from impleading by the injunction. The court acknowledged, however, that UNC would be a proper party to the proceeding. *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215 (1976).

As the Tenth Circuit recognized in *General Atomic Co.* v. *Duke Power Co.*, 553 F. 2d, at 56, 58, GAC is exposed to a substantial risk of inconsistent adjudications in separate proceedings. For example, GAC fears that the arbitrators may find that GAC is obligated to deliver uranium to Commonwealth at the contract prices, while the Santa Fe court may hold, on the contrary, that GAC is not so obligated and excuse UNC from performance to GAC on the ground that its obligations are contingent upon GAC's contractual obligations to Commonwealth. Pet. for Cert. 20–22.

[12] 9 U. S. C. § 2 *et seq.* It is impossible, of course, to foresee all the occasions during the course of this complex litigation in which GAC would justifiably assert claims in federal proceedings.

advantage of federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan*. Federal courts are fully capable of preventing their misuse for purposes of harassment.

The judgment of the New Mexico Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN would not dispose of this case summarily but would grant certiorari and hear argument.

MR. JUSTICE REHNQUIST, dissenting.

The Court holds that a state court lacks the power to enjoin persons subject to its jurisdiction from initiating duplicative and vexatious litigation in the federal courts, litigation which had not been commenced at the time of the state-court injunction. While this conclusion is arguably supported by a portion of the holding of *Donovan* v. *Dallas*, 377 U. S. 408 (1964), it is in many ways contrary to the reasoning of that decision, and undermines the historic power of courts of equity to guard against abuse of judicial proceedings. Because *Donovan* involves a procedural rule which has application in myriad situations, I believe that its holding should be in part re-examined.

In *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965), the Court said:

> "Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great."

The author of *Donovan* was particularly cognizant of the sensitive relationship between state and federal courts. See

Younger v. *Harris*, 401 U. S. 37 (1971); *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 287 (1970). Because the rule in *Donovan* implicates that relationship, I would not extend its holding as the Court now does.

The Court in *Donovan* based its decision on the "general rule" that "state and federal courts would not interfere with or try to restrain each other's proceedings." 377 U. S., at 412. Such a general rule of parity implies that, where a federal district court has power to enjoin the institution of proceedings in state court, a state court must have a similar power to forbid the initiation of vexatious litigation in federal court.

Congress, in enacting the Anti-Injunction Act limiting the authority of United States courts to stay proceedings in any court of a State, 28 U. S. C. § 2283, excepted from the limitation an injunction "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." See *Mitchum* v. *Foster*, 407 U. S. 225, 231–236 (1972); *Atlantic Coast Line*, *supra*, at 294–296. Cf. *Kline* v. *Burke Constr. Co.*, 260 U. S. 226 (1922). If Congress saw fit to create such an exception to the "[l]egislative policy [which] is here expressed in a clear-cut prohibition," *Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 516 (1955), it could not have intended to deny the same limited injunctive authority to state courts of general jurisdiction. Neither the Supremacy Clause of Art. VI of the Constitution or the congressional grants of jurisdiction to federal courts in any way militate against the conclusion that *both* state and federal courts possess the authority to protect jurisdiction which they have acquired from being undercut or nullified by suits later instituted in the courts of the other jurisdiction.

Unlike the Texas Court of Civil Appeals in *Donovan*, the New Mexico District Court in this case enjoined only the initiation of new proceedings, specifically excepting two federal-court actions already begun by petitioner and its constituent partners. Any ambiguity inherent in the wording of the

District Court's injunction with regard to other proceedings has been authoritatively resolved by the Supreme Court of New Mexico, which held: "The injunction is directed only towards the institution of future litigation wherein no federal or state court has yet to acquire jurisdiction." 90 N. M. 120, 124, 560 P. 2d 541, 545 (1977). The existence of power in the state courts to guard against the abuse of the federal courts for purposes of harassment is not foreclosed by *Donovan*, even though this Court, in vacating the contempt citation of those parties who initiated a federal action subsequent to the state order, necessarily held that the Texas court lacked such power in that instance. There, in the subsequent action, the federal plaintiffs sought to enjoin the Supreme Court of Texas from interfering with a pending action which this Court held they had a right to maintain. The conclusion that the New Mexico court has the power to forbid petitioner from involving respondent in a multitude of separate actions with different parties does not undercut the holding of *Donovan* that a federal plaintiff may seek to protect his right to proceed with a pending suit.

The Supreme Court of New Mexico has acted consistently with both the holding and the reasoning of *Donovan*, and I would therefore affirm its judgment.

RINALDI *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-6194. Decided November 7, 1977

After petitioner was convicted of state offenses arising out of a robbery, he was tried and convicted of a federal offense arising out of the same robbery, in violation of the Government's policy against multiple prosecutions for the same act (the so-called *Petite* policy based on *Petite* v. *United States*, 361 U. S. 529). Government trial counsel had represented to the District Court that the Government had decided vigorously to prosecute the federal charges in spite of the prior state prosecution, when in fact the federal prosecution had not been authorized as required by the *Petite* policy. Thereafter, notwithstanding the Government's subsequent acknowledgement that the *Petite* policy had been violated, the District Court denied the Government's motion to dismiss the indictment pursuant to Fed. Rule Crim. Proc. 48 (a) (which provides that the Government may "by leave of court" file a dismissal of an indictment), on the ground, *inter alia*, that the prosecutor had acted in bad faith by representing to the court that he had been properly instructed to maintain the prosecution despite the prior state convictions. The Court of Appeals affirmed. *Held:* The District Court abused its discretion in denying the Government's motion to dismiss on the ground that the violation of the *Petite* policy resulted from prosecutorial misconduct rather than inadvertence. The salient issue is not whether the decision to prosecute was made in bad faith but rather whether the Government's later efforts to terminate the prosecution were similarly tainted with impropriety. It does not appear that there was any bad faith on the Government's part at the time it sought leave to dismiss the indictment but rather that the decision to terminate the prosecution, based as it was on the *Petite* policy, was motivated by considerations which cannot fairly be characterized as "clearly contrary to manifest public interest." The overriding purpose of that policy is to protect the individual from any unfairness associated with needless multiple prosecutions, and accordingly the defendant should receive the benefit of the policy whenever its application is urged by the Government.

Certiorari granted; 544 F. 2d 203, vacated and remanded.

PER CURIAM.

Petitioner's participation in a plot to rob safe-deposit boxes of the Doral Beach Hotel in Miami Beach, Fla., violated the laws of both the State of Florida and the United States. He has been tried, convicted, and sentenced to imprisonment by both sovereigns. He claims that his federal conviction was obtained in violation of established federal policy against multiple prosecutions for the same offense and, for that reason, should be set aside. The Solicitor General agrees and submits that the Court should summarily "vacate the judgment of the court of appeals and remand the case to the district court with instructions to dismiss the indictment." [1] Based on our independent evaluation of the unusual circumstances disclosed by this record, we conclude that such summary disposition is appropriate.

In February 1973, petitioner was charged with state offenses arising out of the Doral Beach Hotel robbery.[2] In March 1973, an indictment was returned in the United States District Court for the Southern District of Florida, charging him with conspiracy to affect interstate commerce by robbery in violation of the Hobbs Act, 18 U. S. C. § 1951.[3] In May, petitioner was convicted of the state charges in the Dade County Circuit Court and sentenced to six years' imprisonment.[4] A subse-

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[1] Memorandum for United States 9.

[2] The state offenses were conspiracy to commit robbery, conspiracy to commit grand larceny, and carrying a concealed weapon.

[3] Section 1951 provides in part:

"(a) Whoever in any way or degree . . . affects commerce . . . by robbery . . . or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

[4] He was sentenced to concurrent terms of five years' imprisonment on the conspiracy to commit robbery and grand larceny counts and a consecutive term of one year's imprisonment on the weapons count. On the State's confession of error, petitioner's conviction of conspiracy to commit grand larceny was reversed on appeal. His convictions on the other two counts were affirmed. See *Scaldeferri* v. *State*, 294 So. 2d 407 (Fla.

quent federal trial ended in a mistrial. Thereafter, the District Court questioned Government counsel regarding the need for another trial in view of petitioner's state convictions. Government counsel responded that he had been instructed by his superiors at the Department of Justice to pursue the federal prosecution vigorously because of their concern that the state convictions might be reversed on appeal. After a second jury trial, petitioner was convicted on the Hobbs Act charge; the District Court imposed a 12-year sentence to run concurrently with the state sentence.

On appeal to the United States Court of Appeals for the Fifth Circuit, petitioner argued that his conviction had been obtained in violation of a longstanding federal policy against multiple prosecutions for the same act. See *Petite* v. *United States*, 361 U. S. 529, 530 (1960).[5] The Government acknowledged that its *Petite* policy had been violated and moved the

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App.), cert. denied *sub nom. Pompeo* v. *State*, 303 So. 2d 21 (Fla.), cert. denied *sub nom. Washington* v. *Florida*, 419 U. S. 993 (1974).

[5] The *Petite* policy is most frequently applied against duplicating federal-state prosecutions. As stated by the Department of Justice, under that policy a federal trial following a state prosecution for the same act or acts is barred "unless the reasons are compelling." A United States Attorney contemplating a federal prosecution in these circumstances is required to obtain authorization from an appropriate Assistant Attorney General. In this case, the Justice Department official who instructed trial counsel to insist upon a retrial had not obtained the requisite approval.

But, as the *Petite* case itself illustrates, the policy also encompasses successive federal prosecutions arising out of the same transaction. In that case, the Solicitor General represented that "it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.' The Solicitor General on behalf of the Government represents this policy as closely related to that against duplicating federal-state prosecutions, which was formally defined by the Attorney General of the United States in a memorandum to the United States Attorneys. (Department of Justice Press Release, Apr. 6, 1959)." 361 U. S., at 530–531.

Court of Appeals to remand the case to the District Court to permit it to seek a dismissal of the indictment. The Court of Appeals granted the motion to remand.

The Government then filed a motion to dismiss the indictment pursuant to Fed. Rule Crim. Proc. 48 (a).[6] Noting that the Rule requires "leave of court," the District Court denied the motion because (1) the motion was not made until after the trial had been completed; and (2) the prosecutor had acted in bad faith by representing to the District Court that he had been properly instructed to maintain the prosecution notwithstanding the fact that petitioner had already been convicted of a state offense.[7] The Government, joined by petitioner and his codefendant Washington, appealed from the denial of the motion to dismiss.

A divided panel of the Fifth Circuit affirmed, *In re Washington,* 531 F. 2d 1297 (1976). The Court of Appeals then granted a petition for rehearing en banc and, by a vote of 7 to 6, reaffirmed the panel's holding. *In re Washington,* 544 F. 2d 203 (1976). All members of the court agreed that the Government's motion to dismiss was timely,[8] but they disa-

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[6] Rule 48 (a) states:

"The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

[7] See n. 5, *supra.*

[8] The prior-authorization requirement in the *Petite* policy ensures that the Department of Justice will normally make the "compelling reasons" determination prior to commencement of the federal prosecution. On occasion, however, a prosecution is initiated and a conviction obtained in violation of the policy. When the Solicitor General has discovered such a violation in a case pending before this Court, he has sought to remedy it by moving to have the case remanded to allow the Government to dismiss the indictment. Exercising our power to afford relief which is "just under the circumstances," 28 U. S. C. § 2106, we have granted the Government's motion on several occasions. See *Watts* v. *United States,* 422 U. S. 1032 (1975); *Ackerson* v. *United States,* 419 U. S. 1099 (1975); *Hayles* v. *United States,* 419 U. S. 892 (1974); Cf. *Redmond* v. *United*

greed on the question whether the prosecutor's bad faith justified the District Court's refusal to set aside defendant's conviction.

The majority was of the view that the Government's unclean hands gave the District Court adequate reason to deny it relief,[9] and that the defendant had no right to have an otherwise valid conviction dismissed simply because the Justice Department violated its own procedures.[10] The dissenters were of the view that the District Court's inquiry should have been limited to the propriety of the Government's motivation in seeking a dismissal;[11] under their view, the earlier mis-

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States, 384 U. S. 264 (1966); *Marakar* v. *United States*, 370 U. S. 723 (1962); *Petite* v. *United States*, 361 U. S. 529 (1960).

[9] The majority described the Government's bad faith in the following terms:

"In this case, an unidentified, but responsible, official within the Department authorized a federal prosecution with full knowledge that such a prosecution was forbidden by the Petite Policy. For the Government to attempt to dismiss by arguing that no compelling reason now exists for a separate federal conviction, when the considerations that allegedly imply a lack of 'compelling reason' were known as fully to the Government throughout both federal trials as now, does, for this court, constitute bad faith." 544 F. 2d, at 208.

[10] The majority stated:

"The fact that the Justice Department is now reconsidering its original decision to prosecute does not vest defendants with any right to have an otherwise valid conviction dismissed. . . . While a determination of such a motion obviously affects defendants, it is not a defendant's interest in avoiding a validly obtained conviction that we weigh in our examination of the propriety of . . . [the District Court's] order." *Id.*, at 209.

[11] They stated:

"[T]he withholding of leave [to dismiss] in this case was not justified. The motive of the prosecutor *in moving for dismissal* was based upon the Petite Policy which is not contrary to the public interest. The prosecutor may have acted in the conduct of the entire litigation in a manner not consistent with the public interest, but his motion to dismiss should not be tainted with that prior activity." *Id.*, at 213 (emphasis in original).

conduct was irrelevant and could not justify the judicial imposition of multiple convictions on the defendant.[12]

The policy described in the *Petite* case limits the federal prosecutor in the exercise of his discretion to initiate, or to withhold, prosecution for federal crimes. The policy is useful to the efficient management of limited Executive resources and encourages local responsibility in law enforcement.[13] But it also serves the more important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct.

In this respect, the policy represents the Government's response to repeated expressions of concern by Members of this Court. In *United States* v. *Lanza*, 260 U. S. 377, 383 (1922), for example, Mr. Chief Justice Taft quoted the following passage from *Fox* v. *Ohio*, 5 How. 410, 435 (1847):

> "It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal sys-

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[12] The dissenters also questioned the logic of the majority's "bad faith" rationale:

"[I]n what has been determined and, indeed, confessed to have been bad faith, the government persisted in a prosecution and obtained, as a result of that bad faith, convictions. The majority holds today that, in order not to 'invite future misconduct by the Government,' we insist that the government be rewarded with the very convictions that it obtained through bad faith prosecutions and, we deny government counsel the right at long last to recant and in good faith dismiss the indictment." *Id.*, at 210–211.

[13] In announcing the policy, Attorney General Rogers stated:

"Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise." Dept. of Justice Press Release, Apr. 6, 1959, p. 3.

> tems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."

What has come to be known as the *Petite* policy was formulated by the Justice Department in direct response to this Court's opinions in *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), and *Abbate* v. *United States,* 359 U. S. 187 (1959), holding that the Constitution does not deny the State and Federal Governments the power to prosecute for the same act. As these decisions recognize, in our federal system the State and Federal Governments have legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both. These cases reflect the concern that if the Double Jeopardy Clause were applied when the sovereign with the greater interest is not the first to proceed, the administration of criminal justice may suffer. *Bartkus* v. *Illinois, supra,* at 137; *Abbate* v. *United States, supra,* at 195. Yet mindful of the potential for abuse in a rule permitting duplicate prosecutions, the Court noted that "[t]he greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy." *Bartkus* v. *Illinois, supra,* at 138.

In response to the Court's continuing sensitivity to the fairness implications of the multiple prosecution power, the Justice Department adopted the policy of refusing to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement.[14] The *Petite* policy was designed to limit the

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[14] At the heart of the policy announced by Attorney General Rogers was the statement:

"It is our duty to observe not only the rulings of the Court but the

exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power. Although not constitutionally mandated, this Executive policy serves to protect interests which, but for the "dual sovereignty" principle inherent in our federal system, would be embraced by the Double Jeopardy Clause. In light of the parallel purposes of the Government's *Petite* policy and the fundamental constitutional guarantee against double jeopardy, the federal courts should be receptive, not circumspect, when the Government seeks leave to implement that policy.

Here, the Government filed a motion under Fed. Rule Crim. Proc. 48 (a) seeking "leave of court" to dismiss the federal charges against petitioner. Under the standard applied by the Court of Appeals, the District Court was empowered to withhold leave if the Government's decision to terminate this prosecution clearly disserved the public interest. *United States* v. *Cowan*, 524 F. 2d 504, 513 (CA5 1975).[15] Pursuant

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spirit of the rulings as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it.

"Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently—as the Court clearly indicated—those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area." *Ibid.*

[15] The words "leave of court" were inserted in Rule 48 (a) without explanation. While they obviously vest some discretion in the court, the circumstances in which that discretion may properly be exercised have not been delineated by this Court. The principal object of the "leave of court" requirement is apparently to protect a defendant against prosecutorial harassment, *e. g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection. See, *e. g.*, *United States* v. *Cox*, 342 F. 2d 167, 171 (CA5), cert. denied, *sub nom. Cox* v. *Hauberg*, 381 U. S. 935 (1965); *Woodring* v. *United States*, 311 F. 2d 417, 424 (CA8), cert. denied, *sub nom. Felice* v. *United States*, 373 U. S. 913 (1963). But the Rule has also been held to

to the instructions of a superior at the Justice Department, Government trial counsel represented to the District Court that the United States had decided to vigorously prosecute the federal charges against petitioner in spite of the prior state prosecution. In fact, however, the federal prosecution had not been authorized as required by the Government's *Petite* policy. The Court of Appeals considered the prosecutor's representations incompatible with the public interest in preserving the integrity of the courts. The salient issue, however, is not whether the decision to maintain the federal prosecution was made in bad faith but rather whether the Government's later efforts to terminate the prosecution were similarly tainted with impropriety. Our examination of the record has not disclosed (and we will not presume) bad faith on the part of the Government at the time it sought leave to dismiss the indictment against petitioner. The decision to terminate this prosecution, based as it was on the *Petite* policy, was motivated by considerations which cannot fairly be characterized as "clearly contrary to manifest public interest." 524 F. 2d, at 513.[16]

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permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest. See *United States* v. *Cowan*, 524 F. 2d 504 (CA5 1975); *United States* v. *Ammidown*, 162 U. S. App. D. C. 28, 33, 497 F. 2d 615, 620 (1973). It is unnecessary to decide whether the court has discretion under these circumstances, since, even assuming it does, the result in this case remains the same.

[16] In reaching a contrary conclusion, the Court of Appeals relied heavily on the remarks of a Government attorney during oral argument. Attempting to rebut the charge that the "responsible person" in the Justice Department who authorized this prosecution showed bad faith by not seeking the approval of the Attorney General, the Government attorney apparently contended it would be proper to continue a federal prosecution until the integrity of a prior state conviction was assured and then to seek dismissal of the federal charges. If counsel's argument represented the position of the United States, it would indeed mark a departure from

The overriding purpose of the *Petite* policy is to protect the individual from any unfairness associated with needless multiple prosecutions. The defendant, therefore, should receive the benefit of the policy whenever its application is urged by the Government.[17] Without derogating from the concern expressed by the Court of Appeals regarding the actions of certain Government officials at an earlier stage in this prosecution, we agree with the Solicitor General that "[n]o action by the Department or the Court can now replace the waste of judicial and prosecutorial resources expended in obtaining petitioner's conviction . . . [and] no societal interest would be vindicated by punishing further a defendant who has already been convicted and has received a substantial sentence in state court and who, the Department has deter-

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the *Petite* policy. But we are persuaded that counsel's overzealous attempt to rationalize the prior conduct of the prosecution did not signal a new Executive policy on multiple prosecutions. The Solicitor General unequivocally states that the Government has strictly adhered to the *Petite* policy since its announcement in 1959. Memorandum for United States 3, 7. The Solicitor General represents further that the Government sought dismissal of the indictment in this case because it discovered on appeal from petitioner's federal conviction that the prosecution was initiated and maintained without the prior authorization required by the *Petite* policy. *Id.*, at 3, 6–7. There is no suggestion in this case that the Assistant Attorney General charged with enforcement of the *Petite* policy was cognizant of the violation until shortly before the Government's request for leave to dismiss the indictment. In these circumstances, we cannot accept the conclusion of the Court of Appeals that the Government's decision to dismiss the indictment was made in bad faith.

[17] The Court of Appeals thought it necessary to deprive petitioner of the policy's benefit in order to deter future misconduct by Government attorneys. As did the dissenters below, we fail to see how rewarding those responsible for the *Petite* policy violation with a conviction serves to deter prosecutorial misconduct. Indeed, a result which leaves intact a conviction obtained through a prosecution tainted by bad faith may encourage repetition of the impropriety disclosed by the record in this case.

mined, should not have been prosecuted by the federal government."

It was, therefore, an abuse of the discretion of the District Court to refuse to grant the Government's motion on the ground that the violation of the *Petite* policy in this case resulted from prosecutorial misconduct rather than inadvertence. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated, and the case is remanded to the District Court for the purpose of dismissing the indictment.

It is so ordered.

MR. CHIEF JUSTICE BURGER, dissents.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

In *Watts* v. *United States*, 422 U. S. 1032 (1975), this Court, with three Justices dissenting, remanded a federal criminal case with instructions to dismiss the indictment because of the concession of the Solicitor General that the Justice Department had accidentally violated its own *Petite* policy. See also *Ackerson* v. *United States*, 419 U. S. 1099 (1975); *Hayles* v. *United States*, 419 U. S. 892 (1974). Whatever may be the propriety of our assisting in the enforcement of the Justice Department's internal *Petite* policy, the Court today places its imprimatur on a quite different and unsettling prosecutorial policy. Under this new policy, the Government prosecutes under federal laws individuals who have already been tried and convicted of violating similar state laws in order to protect against the possibility of the state convictions' being reversed on appeal, but the policy contemplates that the federal prosecutions will be dismissed, even after entry of guilty verdicts, if the state convictions are ultimately affirmed. According to the Court of Appeals:

> "[T]he Government attorney conceded that a 'responsible person' within the Department of Justice . . . was aware

that the Petite Policy was being violated through its prosecution of defendants, but nevertheless, out of his fear that the state convictions would be reversed on appeal, instructed the trial attorney to proceed with the case; only after a Florida appellate court affirmed the state convictions and after defendants raised the Petite Policy on appeal did the Government move for dismissal. . . . [According to the Government attorney], the position of the Department of Justice is *not* that the prosecution should never have been brought, but that once the state convictions had been affirmed the Government could properly have moved to dismiss the federal indictment against defendants. Indeed, he states that had permission to prosecute been sought from an Assistant Attorney General by the 'responsible person' in charge of the case, it might well have been given and hence, there would have been no violation of the Petite Policy. Had that event occurred, . . . it would have then been absolutely proper, once the Florida appellate court affirmed the state conviction on appeal, for the Department of Justice to rescind, retroactively, its authorization of the prosecution and now, finding the Petite Policy to have been violated by a federal trial for an offense for which a state prosecution was made, to seek a dismissal based on this violation of the policy and the interest against duplicitous prosecutions that it seeks to promote." *In re Washington*, 544 F. 2d 203, 207.*

*The Solicitor General does not contradict or repudiate the position of the Government attorney who argued before the Court of Appeals. Under such circumstances, this Court should not casually reject the Court of Appeals' understanding of the position of the Department of Justice in this case, an understanding that the dissenters there apparently shared. According to the Solicitor General, when the Government's appellate counsel was informed that the prosecutor had not strictly followed the Justice Department's *Petite* policy, further consideration was given to the case within the Department and "it was determined that there were no com-

Federal Rule Crim. Proc. 48 (a) allows the United States to move to dismiss an indictment only "by leave of court." This proviso was specifically added as an amendment to the original draft, which had provided for automatic dismissal upon the motion of the United States, and would seem clearly directed toward an independent judicial assessment of the public interest in dismissing the indictment. Cf. *United States* v. *Cowan*, 524 F. 2d 504 (CA5 1975). Here, both the District Court and the Court of Appeals concluded that dismissal would not be in the public interest. I cannot find this conclusion an abuse of the discretion given the lower courts by Rule 48 (a). As the Court of Appeals reasoned, "the Government's attempt to manipulate the use of judicial time and resources through its capricious, inconsistent application of its own policy clearly constitutes bad faith and a violation of the public interest; our sanction of such conduct would invite future misconduct by the Government." 544 F. 2d, at 209.

In the past, the Court has ordered indictments dismissed upon the Government's concession that it violated its own *Petite* policy without discussing the justification for its action. Here, in its first full opinion on the subject, the Court again fails to enunciate why federal courts must reverse a valid conviction because of the Government's admission of administrative error not going to the guilt or innocence of the defendant. Cf. *Watts*, *supra*, at 1032–1038 (BURGER, C. J., dissenting). The apparent inability of the Court to agree on a rationale for enforcing the Government's *Petite* policy at its request suggests that this case is inappropriate for summary disposition and should be set for full argument.

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pelling reasons to justify *retroactive* authorization of petitioner's prosecution." Memorandum for United States 3 (emphasis added). By this time, as the Court of Appeals noted, the state conviction was safely affirmed.

CITIZENS & SOUTHERN NATIONAL BANK *v.* BOUGAS

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 76–398. Argued October 3, 1977—Decided November 8, 1977

Under 12 U. S. C. § 94, which provides that actions against a national bank may be brought in any federal district court within the district in which the bank may be "established" or in any state court in the county or city in which the bank is "located" having jurisdiction in such cases, venue for a suit against a national bank brought in a state court need not be in the county where the bank's charter was issued but may be in the county in which the bank conducts its business at an authorized branch. Pp. 38–45.

138 Ga. App. 706, 227 S. E. 2d 434, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court. STEWART, J., filed a concurring opinion, *post*, p. 45.

William C. Humphreys, Jr., argued the cause for petitioner. With him on the brief was *Daniel B. Hodgson*.

Michael J. Kovacich argued the cause and filed a brief for respondent.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an issue of state-court venue of a transitory cause of action against a national bank. The suit was filed in the state court of the county of the branch and not in the court of the different county specified in the bank's charter.

The governing statute is Rev. Stat. § 5198, 12 U. S. C. § 94:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which

> said association is located having jurisdiction in similar cases."

The dispute obviously centers in the word "located" as it is employed in the statute.[1]

I

Petitioner Citizens and Southern National Bank is a national banking association. It received its charter from the Comptroller of the Currency on May 2, 1927. The "place where its operations . . . are to be carried on," [2] is described in that charter as the "City of Savannah, in the County of

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[1] The word "located" appears in at least two other federal statutes concerning national banks:

Title 28 U. S. C. § 1394 provides:

"Any civil action by a national banking association to enjoin the Comptroller of the Currency, under the provisions of any Act of Congress relating to such associations, may be prosecuted in the judicial district where such association is located."

And 28 U. S. C. § 1348 reads:

"The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."

See *First Nat. Bank* v. *Williams*, 252 U. S. 504 (1920), and *Herrmann* v. *Edwards*, 238 U. S. 107 (1915), for comments upon the history of these respective statutes.

[2] Title 12 U. S. C. § 22 reads in part:

"The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

. . . . . .

"Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village."

Chatham and State of Georgia." App. 13. For some time now, however, the bank has done business not only at Savannah but also at branches, authorized under 12 U. S. C. § 36, in other Georgia counties. Tr. of Oral Arg. 4. One of these branches is at Decatur in De Kalb County. See *United States* v. *Citizens & Southern Nat. Bank*, 422 U. S. 86, 92 n. 4, 94 (1975). De Kalb County adjoins Fulton County; the city of Atlanta lies in both.

In late June 1975 respondent Bougas sued petitioner bank. His complaint was filed in the state court of De Kalb County. He sought actual and punitive damages for an alleged conversion of a $25,000 savings certificate issued to respondent and deposited by him as collateral for his son's note on which respondent had signed as surety.

The bank accompanied its answer to the complaint with a motion to dismiss respondent's suit "on the grounds of improper venue and lack of jurisdiction over Defendant." App. 9. It asserted that a national bank may be sued in a state court only "in the county in which its charter was issued," that is, for petitioner, only in Chatham County. *Ibid.* The De Kalb County Court denied that motion. App. to Pet. for Cert. A5. The Georgia Court of Appeals granted the bank's application for interlocutory appeal, but in due course affirmed. 138 Ga. App. 706, 227 S. E. 2d 434 (1976).[3] We granted certiorari, 429 U. S. 1071 (1977), in order to resolve an apparent conflict, hereinafter noted, among state courts in their construction of the word "located" in 12 U. S. C. § 94, when a defendant national bank is conducting banking business at an authorized branch outside its charter county.

Two issues are suggested by the parties: (1) Where is a national bank "located," within the meaning of § 94, for purposes of a transitory action brought in a state court, when

[3] The Supreme Court of Georgia, with one justice dissenting, denied certiorari. App. to Pet. for Cert. A8. Petitioner's motion for reconsideration was also denied, with two justices dissenting. *Id.*, at A9.

it conducts banking business at an authorized branch outside its charter county? (2) In any event, does its conduct of banking business at the branch constitute a waiver, actual or presumptive, of any venue restriction § 94 otherwise imposes? We decide the case adversely to the bank on the first issue and do not reach the question of waiver.

II

This Court has had prior occasion to consider § 94. It is now settled that the statute's provision concerning venue in state courts, despite the presence of what might be regarded as permissive language, "is not permissive, but mandatory, and, therefore, 'that national banks may be sued only in those state courts in the county where the banks are located.'"[4] *National Bank* v. *Associates of Obstetrics*, 425 U. S. 460, 461 (1976), quoting *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 561 (1963). See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 152 (1976); *Cope* v. *Anderson*, 331 U. S. 461, 467 (1947). The venue provision, however, has been held to be a privilege personal to the bank, and to be subject to waiver. *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141, 145 (1889); *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S., at 561, and n. 12.

In our view, this language of command does not in itself equate the statute's word "located" with the county designated in the bank's organization certificate and in its formal charter. Petitioner insists that the Court's reference in *Langdeau* to the effect that a ruling that would recognize state jurisdictional and venue requirements "would render altogether meaningless a congressional enactment permitting suit to be

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[4] The Court long ago perceived a "local-action exception" to this rule. *Casey* v. *Adams*, 102 U. S. 66, 67–68 (1880). See *National Bank* v. *Associates of Obstetrics*, 425 U. S. 460, 461–462, n. (1976); *Michigan Nat. Bank* v. *Robertson*, 372 U. S. 591, 593 (1963). The exception, however, as *Casey* v. *Adams* itself acknowledges, 102 U. S., at 67, does not apply to an ordinary transitory action. See *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 561 n. 11 (1963).

brought in the bank's home county," *id.*, at 560, "implicitly entails the conclusion that a national bank cannot also be sued in any county wherein it operates branch banks." Brief for Petitioner 17. This, however, overstates the language and holding in *Langdeau*, a case that did not concern authorized branch banking at all. *Langdeau* is only the starting point, not the conclusion, for the resolution of the present case.[5]

III

A. The lower federal courts appear to be unanimous in holding that a national bank, under § 94, is "established" only in the federal district that encompasses the place specified in the bank's charter. *E. g., Leonardi* v. *Chase Nat. Bank*, 81 F. 2d 19, 21–22 (CA2), cert. denied, 298 U. S. 677 (1936); *Northside Iron & Metal Co.* v. *Dobson & Johnson, Inc.*, 480 F. 2d 798, 799–800 (CA5 1973). See 7A Michie, Banks and Banking, ch. 15, § 220a (4) (1973 ed.); 1 J. Moore, J. Lucas, H. Fink, D. Weckstein, & J. Wicker, Moore's Federal Practice ¶ 0.144 [2.–1], p. 1473 (2d ed. 1977). This rule, however, is not without its scholarly criticism. See Steinberg, Waiver of Venue under the National Bank Act: Preferential Treatment for National Banks, 62 Iowa L. Rev. 129 (1976); Comment, Restricted Venue in Suits Against National Banks: A Procedural Anachronism, 15 Wm. & Mary L. Rev. 179 (1973); Note, An Assault on the Venue Sanctuary of National Banks, 34 Geo. Wash. L. Rev. 765 (1966); ALI, Study of the Division of Jurisdiction Between State and Federal Courts 77, 412–413 (1969). See also *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 483 F. 2d 852, 855 (CA3 1973).

We are not concerned in the present case, however, with this federal aspect of venue, and we have no occasion here to review these rulings.

B. We note in the decided state cases no less than three diverse interpretations of § 94:

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[5] At oral argument petitioner acknowledged that *Langdeau* "is not determinative of the issue." Tr. of Oral Arg. 15.

1. Several rulings consider the words "established" and "located" to be functionally synonymous. Absent waiver, these cases restrict a state-court action against a national bank to the place designated in the bank's charter. *E. g., Ebeling* v. *Continental Illinois Nat. Bank & Trust Co.*, 272 Cal. App. 2d 724, 726–727, 77 Cal. Rptr. 612, 614 (1969); *Gregor J. Schaefer Sons, Inc.* v. *Watson*, 26 App. Div. 2d 659, 272 N. Y. S. 2d 790, 791 (1966); *Prince* v. *Franklin Nat. Bank*, 62 Misc. 2d 855, 310 N. Y. S. 2d 390, 391 (Sup. Ct. 1970). See 7A Michie, Banks and Banking, ch. 15, § 220b (1973 ed.).[6]

2. In contrast, other decisions hold that "established" and "located" are not synonymous. For state-court purposes, it is said, a bank may be "located" in any place where it operates and maintains a branch doing general banking business, even though, for federal-court purposes, it is "established" only at the place specified in its charter. *E. g., Security Mills of Asheville, Inc.* v. *Wachovia Bank & Trust Co.*, 281 N. C. 525, 532, 189 S. E. 2d 266, 271 (1972); *Holson* v. *Gosnell*, 264 S. C. 619, 623, 216 S. E. 2d 539, 541 (1975), cert. denied, 423 U. S. 1048 (1976); *Central Bank* v. *Superior Court*, 30 Cal. App. 3d 962, 971, 106 Cal. Rptr. 912, 918 (1973). The Georgia Court of Appeals in the present litigation so interpreted § 94. 138 Ga. App., at 709, 227 S. E. 2d, at 436.

3. Still other courts conclude that by establishing a branch in a county other than that designated in its charter, a national

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[6] In a number of federal cases the words "established" and "located" have been regarded as essentially the same. *E. g., Leonardi* v. *Chase Nat. Bank*, 81 F. 2d 19, 21–22 (CA2), cert. denied, 298 U. S. 677 (1936); *Northside Iron & Metal Co.* v. *Dobson & Johnson, Inc.*, 480 F. 2d 798, 799 (CA5 1973); *Fisher* v. *First Nat. Bank*, 538 F. 2d 1284, 1286–1287 (CA7 1976), cert. denied, 429 U. S. 1062 (1977); *United States Nat. Bank* v. *Hill*, 434 F. 2d 1019, 1020 (CA9 1970). See 7A Michie, Banks and Banking, ch. 15, § 220a (4) (1973 ed.). These cases, however, necessarily were concerned with the word "established" and not with "located." None dealt with the issue of venue of a state-court suit against a national bank in a county in which the bank was operating only a branch.

bank presumptively waives any venue restriction of § 94, at least as to a suit arising out of banking activity at that branch. *Lapinsohn* v. *Lewis Charles, Inc.*, 212 Pa. Super. 185, 193–195, 240 A. 2d 90, 94–95, cert. denied *sub nom. First Camden Nat. Bank & Trust Co.* v. *Lapinsohn*, 393 U. S. 952 (1968); *Security Mills of Asheville, Inc.* v. *Wachovia Bank & Trust Co., supra* (alternative ground). See *Vann* v. *First Nat. Bank*, 324 So. 2d 94, 95 (Fla. App. 1975), and *Exchange Nat. Bank* v. *Rotocast Plastics Products, Inc.*, 341 So. 2d 787, 789 (Fla. App. 1977).

These inconsistent approaches cannot all be appropriately interpretive of § 94. We therefore look to the legislative history to see what light it may afford.

IV

This Court reviewed that history, so far as it concerned the state-court venue provision, in *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S., at 558–562. There the Court noted: (a) "Unquestionably Congress had authority to prescribe the manner and circumstances under which [national] banks could sue or be sued in the courts," *id.*, at 559. (b) The "roots" of the venue problem "reach back to" the National Bank Act of 1863, 12 Stat. 665. 371 U. S., at 558. (c) Section 59 of the 1863 Act, 12 Stat. 681, spoke only of suits in a federal court "within the district in which the association was established" and made no mention of suits in state courts, 371 U. S., at 559. (d) The 1863 Act was replaced shortly by the National Bank Act of 1864, 13 Stat. 99, ch. 106, which, in its § 57, "carried forward the former § 59 and also added" the provision that " 'suits . . . may be had . . . in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases,' " 371 U. S., at 560. (e) "Congress intended that in those courts alone could a national bank be sued against its will," *ibid.* (f) Although § 57 was omitted from Title 62 (National Banks)

of the Revised Statutes of 1873, Title 13 (the Judiciary) contained provisions, § 563 Fifteenth, "granting the federal courts jurisdiction over suits by and against national banks brought in the district of their residence," 371 U. S., at 560. And (g) the Act of February 18, 1875, ch. 80, 18 Stat., pt. 3, p. 320, added to § 5198 of the Revised Statutes of 1873 "provisions substantially identical to § 57 of the 1864 Act," [7] and thus, "for a second time Congress specified the precise federal and state courts in which suits against national banks could be brought," 371 U. S., at 560–561.

The conclusions drawn by the Court from *Langdeau*'s review of the history of § 94's state-court venue provision were the obvious ones already noted: "[N]ational banks may be sued only in those state courts in the county where the banks are located," 371 U. S., at 561, and "the statute must be given a mandatory reading," *id.*, at 562. This is not to say, however—and the Court in *Langdeau* did not say—that § 94's pivotal word "located," in a branch banking context, would mean and be restricted to the place designated in the bank's charter. What the Court in *Langdeau* specifically held was that § 94 prevailed, on a plea of privilege, over a state venue statute that would have permitted suit in an outside county where a receivership proceeding for an allegedly defrauded insurance company was pending. *Langdeau* in no way hampers our consideration of the branch banking problem.

There can be little question, as petitioner argues, Brief for Petitioner 14, that at the time the 1864 Act was passed, the activities of a national bank were restricted to one particular

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[7] The addition was:

"That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

See *Third Nat. Bank* v. *Impac, Ltd.*, 432 U. S. 312, 316–318 (1977); *id.*, at 325–327 (dissenting opinion).

location. That Act's provisions to the effect that the organization certificate (as 12 U. S. C. § 22 also requires today) shall specifically state "the particular county and city, town, or village" of its place of operations, 13 Stat. 101, and that the bank's "usual business shall be transacted at an office or banking house located in the place specified in its organization certificate," 13 Stat. 102 (cf. 12 U. S. C. § 81), indicated as much. National banks (other, perhaps, than those that originally were state banks with existing branches) were not permitted to engage in branch banking until 1927, when the McFadden Act, 44 Stat., pt. 2, p. 1224, was passed; moreover, the McFadden Act allowed national banks to "establish" branches only if permitted by state law, and only "within the limits of the city, town, or village in which said association is situated," *id.*, at 1228. It was not until 1933 that Congress approved, upon specified conditions, national bank branches beyond the place named in the charter. 48 Stat. 189–190.

Petitioner argues that since a national bank in 1864 was permitted only one "location," namely, that specified in the charter, "there is no statutory basis for interpreting the word 'located' as having multi-county reference." Brief for Petitioner 15. It says that one may not presume "that the Congress anticipated by some sixty years the advent of multi-county branch banking and formulated its statutory language accordingly." *Ibid.*

We need not travel that far analytically in determining congressional intent. It suffices to stress that Congress did not contemplate today's national banking system, replete with branches, when it formulated the 1864 Act; that there are no sure indicators of 1864 congressional intent with respect to a banking system that did not then exist; and that prior to 1927, and, indeed, prior to 1933, Congress had no occasion whatsoever to be concerned with state-court venue other than at the place designated in the bank's charter.[8] Throughout

[8] Petitioner argues that the failure of Congress to change § 94 when it

this early period, the words "established" and "located" led to the same ultimate venue result.

Nevertheless, the two words are different. One must concede that a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located." Whatever the reason behind the distinction in the words, it does exist, and we recognize it. In fact, in *Langdeau*, the Court did not coalesce the two terms but said that "national banks may be sued only in those state courts in the county where the banks are located," 371 U. S., at 561.

There is no enduring rigidity about the word "located." What Congress was concerned with was the untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation. *Charlotte Nat. Bank* v. *Morgan*, 132 U. S., at 145; *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S., at 561–562, n. 12. That concern largely evaporates when the venue of a state-court suit coincides with the location of an authorized branch.[9] It is also diminished by improvements in data processing and transportation.[10]

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approved branch banking demonstrates a congressional intent to restrict venue to the charter county. Brief for Petitioner 15–16, n. 28. We do not find this argument persuasive; petitioner offers nothing to the effect that Congress even considered venue when it authorized branch banking in 1927 and 1933.

[9] One may argue, of course, that the concern also should evaporate with respect to a federal suit at the place of the branch. That issue is not before us. In any event, as has been stated above, we have no occasion here to disturb the consistent authority relating to federal venue.

[10] This interpretation of § 94 will not inconvenience the bank or unfairly burden it with distant litigation in violation of any congressional policy. We recognize that Congress adopts venue provisions in part for the convenience of the parties. See *Olberding* v. *Illinois Central R. Co.*, 346 U. S. 338, 340 (1953) (interpreting 28 U. S. C. § 1391 (a)). Litigation of this

V

Finally, we do not share petitioner's proposition that, for still another reason, the words "established" and "located," although different, may not have dichotomous meanings. Petitioner notes the appearance of "any" and "the" in § 94, and argues that the former suggests a potential plurality, whereas the definite article modifies nouns that are singular and denote a unique geographical status. Petitioner then asserts that from this grammatical construction of the statute it may be concluded that if Congress had intended a plurality of places where a national bank could be located, it would have substituted "any" for "the," or at least would have employed plural nouns rather than singular ones.

This dissection of the face of the statute is possible argumentation. But petitioner does not proffer it as anything more than that. It is certainly not persuasive in itself, and our experience with the inexactitude of congressional language, an inexactitude that perhaps often is inevitable—see, for example, *Buckley* v. *Valeo*, 424 U. S. 1 (1976); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395 (1975)—does not convince us that much weight can be attached to the use of "any" and "the," respectively, in § 94.

The judgment of the Court of Appeals of the State of Georgia is

Affirmed.

MR. JUSTICE STEWART, concurring.

The Court's opinion, despite its disclaimer, may be read by some to imply approval of the view that, for purposes of

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dispute in De Kalb County inconveniences no one to any real degree. Respondent chose to file his suit there. Petitioner has established a permanent business there, taking advantage of the commerce of the community. Its attorneys have their offices in adjoining Fulton County, part of the Atlanta metropolitan area. Litigation in De Kalb County cannot be more inconvenient than litigation in Chatham County, the place of chartering, some 200 miles away.

federal-court venue under 12 U. S. C. § 94, a national bank is "established" only in the district that includes its charter county. See *ante*, at 39–41, 44, 45. I have serious doubt that the cases so holding were correctly decided,* and in any event this question remains an open one here.

Today we decide only that for purposes of state-court venue under § 94 a national bank is "located" in any county in which it has a branch bank. There is no need in this case to consider the meaning of the word "established" in § 94, or to draw any contrast between the words "established" and "located." It is upon this understanding that I join the opinion of the Court.

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* The first case to decide the question, *Leonardi* v. *Chase Nat. Bank*, 81 F. 2d 19 (CA2), relied primarily on a First Circuit decision holding that a national bank chartered in New York was not "located" in Puerto Rico, where it operated a branch bank, for purposes of taxation of the bank's shares, *National City Bank* v. *Domenech*, 71 F. 2d 13, and on the general provision for corporate venue which at that time limited venue to the district of incorporation. See 1 Moore's Federal Practice ¶ 0.141 [4], p. 1352 (2d ed. 1977). Neither analogy compelled the Second Circuit's conclusion. Subsequent cases have not amplified *Leonardi*'s reasoning. See *United States Nat. Bank* v. *Hill*, 434 F. 2d 1019 (CA9), and cases cited therein.

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* JOBST

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 76–860. Argued October 4, 1977—Decided November 8, 1977

Provisions of the Social Security Act specifying that secondary benefits under the Act received by a disabled dependent child of a covered wage earner shall terminate when the child marries an individual who is not entitled to benefits under the Act, even though that individual is permanently disabled, *held* not to violate the principle of equality embodied in the Due Process Clause of the Fifth Amendment. Pp. 50–58.

(a) The general rule that entitlement to a child's statutory benefits terminates upon marriage is rational. Congress, in lieu of requiring individualized proof of dependency on a case-by-case basis, could assume that marital status is a relevant test of probable dependency, a married person being less likely than an unmarried person to be dependent on his parents for support. Pp. 52–54.

(b) The exception provided for disabled children who marry individuals entitled to benefits under the Act to the general rule that marriage terminates a child's statutory benefits is likewise rational. That exception, which is a reliable indicator of probable hardship, requires no individualized inquiry into degrees of need or periodic review to determine continued entitlement. Moreover, Congress could reasonably take one step to eliminate hardship caused by the general marriage rule without at the same time accomplishing its entire objective. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483. Pp. 54–58.

368 F. Supp. 909, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Stephen L. Urbanczyk argued the cause *pro hac vice* for appellant. With him on the brief were *Solicitor General McCree, Assistant Attorney General Babcock,* and *William Kanter.*

J. D. Riffel argued the cause and filed a brief for appellee.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether Congress has the power to require that a dependent child's social security benefits terminate upon marriage even though his spouse is permanently disabled. Answering that question in the negative, the District Court held that 42 U. S. C. §§ 402 (d)(1)(D) and 402 (d)(5) deprive appellee of property without due process of law. *Jobst* v. *Richardson*, 368 F. Supp. 909. We reverse.

Mr. Jobst has been disabled by cerebral palsy since his birth in 1932. He qualified for child's insurance benefits in 1957, several months after his father died. In 1970 he married another cerebral palsy victim. Since his wife was not entitled to benefits under the federal Act,[1] the statute required the Secretary to terminate his benefits.[2]

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[1] Mrs. Jobst was receiving welfare assistance from the Division of Welfare of the State of Missouri, but was not receiving any social security benefits under 42 U. S. C. §§ 401–432 (1970 ed. and Supp. V).

[2] Section 202 of the Social Security Act, 49 Stat. 623, as amended, 42 U. S. C. § 402 (1970 ed. and Supp. V), provides in pertinent part:

"(d)(1) Every child (as defined in section 416 (e) of this title) of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—

"(A) has filed application for child's insurance benefits,

"(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423 (d) of this title) which began before he attained the age of 22, and

"(C) was dependent upon such individual—

. . . . .

"shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—

"(D) the month in which such child dies or marries,

. . . . .

"(5) In the case of a child who has attained the age of eighteen and who marries—

Mr. Jobst brought this suit to review the Secretary's action.[3] The District Court held that the statute violated the equality principle applicable to the Federal Government by virtue of the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U. S. 497, because all child's insurance beneficiaries are not treated alike when they marry disabled persons. Beneficiaries who marry other social security beneficiaries continue to receive benefits whereas those who marry nonbeneficiaries lose their benefits permanently. The court held this distinction irrational. 368 F. Supp., at 913.

The Secretary appealed directly to this Court. 28 U. S. C. § 1252. Noting that Mr. Jobst and his wife had become entitled to benefits under a newly enacted statute authorizing supplemental security income for the aged, blind, and disabled,[4] this Court remanded the case for reconsideration in the light of that program. *Weinberger* v. *Jobst*, 419 U. S. 811.

"(A) an individual entitled to benefits under subsection (a), (b), (e), (f), (g), or (h) of this section or under section 423 (a) of this title, or

"(B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection,

"such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (s) of this section, not be terminated by reason of such marriage . . . .

. . . . . .

"(s)(2) . . . [S]o much of subsectio[n] . . . (d)(5) . . . of this section as precedes the semicolon, shall not apply in the case of any child unless such child, at the time of the marriage referred to therein, was under a disability . . . ."

[3] Mr. Jobst first exhausted his administrative remedies. A hearing examiner found in his favor, ruling that the denial of benefits was unconstitutional. The Appeals Council reversed; it held that an administrative agency has no power to rule on the constitutionality of the Act it administers.

[4] See Title XVI of the Social Security Act, as amended by the Social Security Amendments of 1972, 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* (1970 ed., Supp. V).

The District Court reviewed the new program, concluded that it had no relevance to the issues presented by this case, and reinstated its original judgment. The Secretary again appealed, and we noted probable jurisdiction. 429 U. S. 1089.

Although the District Court focused on the statutory consequences of a marriage between two disabled persons, the Secretary argues that the relevant statutory classification is much broader. We therefore first describe the statutory scheme, then consider the validity of a general requirement that benefits payable to a wage earner's dependent terminate upon marriage, and finally decide whether such a general requirement is invalidated by an exception limited to marriages between persons who are both receiving benefits.

I

As originally enacted in 1935, the Social Security Act authorized a monthly benefit for qualified wage earners at least 65 years old and a death benefit payable to the estate of a wage earner who died at an earlier age. 49 Stat. 622–624. In 1939 Congress created secondary benefits for wives, children, widows, and parents of wage earners. See 53 Stat. 1362, 1364–1366. The benefits were intended to provide persons dependent on the wage earner with protection against the economic hardship occasioned by loss of the wage earner's support. *Mathews* v. *De Castro*, 429 U. S. 181, 185–186. Generally speaking, therefore, the categories of secondary beneficiaries were defined to include persons who were presumed to be dependent on the wage earner at the time of his death, disability, or retirement.

Specifically, the child's benefit as authorized in 1939 was available only to a child who was unmarried, under 18, and dependent upon the wage earner at the time of his death or retirement. 53 Stat. 1364. Since Mr. Jobst was 23 at the time of his father's death, he would not have been eligible for a child's benefit under the 1939 Act. Under that statute,

the child's benefit, like the benefits for widows and parents, terminated upon marriage. 53 Stat. 1364–1366.

In 1956, Congress enlarged the class of persons entitled to a child's benefit to include those who, like Mr. Jobst, were under a disability which began before age 18.[5] For such a person the benefit continued beyond the age of 18 but, as with other secondary benefits, it terminated upon marriage.

In 1958, Congress adopted the amendment that created the basis for Mr. Jobst's constitutional attack. The amendment provided that marriage would not terminate a child's disability benefit if the child married a person who was also entitled to benefits under the Act. See 72 Stat. 1030–1031. A similar dispensation was granted to widows, widowers, divorced wives, and parents.[6] In each case the secondary benefit survives a marriage to another beneficiary, but any other marriage—even to a disabled person unable to provide the beneficiary with support—is a terminating event unaffected by the 1958 amendment.

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[5] The 1956 amendment replaced the requirement that the child be under 18 at the time of application with a requirement that he be either under 18 or "under a disability . . . which began before he attained the age of eighteen . . . ." 70 Stat. 807. In 1972, Congress raised the age before which the child's disability must begin from 18 to 22. 86 Stat. 1343–1345.

[6] 72 Stat. 1030–1032. The House Report explained the purpose of this change:

"When a secondary beneficiary marries, such person's benefit is terminated under present law. If he marries a person who is or who will become entitled to an old-age insurance benefit, he may qualify for a new benefit based on the earnings of the new spouse. But if the new spouse is also receiving a secondary benefit, the benefits of both are terminated and ordinarily neither beneficiary can become entitled to any new benefits. Your committee's bill would eliminate the hardship in these cases by providing that marriage would not terminate a benefit where a person receiving mother's, widow's, widower's, parent's, or childhood disability benefits marries a person receiving any of these benefits or where a person receiving mother's or childhood disability benefits marries a person entitled to old-age insurance benefits." H. R. Rep. No. 2288, 85th Cong., 2d Sess., 18 (1958).

It was the failure of Congress in 1958 to create a larger class of marriages that do not terminate the child's benefit for disabled persons that the District Court found irrational.

II

The provision challenged in this case is part of a complex statutory scheme designed to administer a trust fund financed, in large part, by taxes levied on the wage earners who are the primary beneficiaries of the fund. The entitlement of any secondary beneficiary is predicated on his or her relationship to a contributing wage earner. If the statutory requirements for eligibility are met, the amount of the benefit is unrelated to the actual need of the beneficiary. See, *e. g., Mathews* v. *De Castro, supra,* at 185–186. The statute is designed to provide the wage earner and the dependent members of his family with protection against the hardship occasioned by his loss of earnings; it is not simply a welfare program generally benefiting needy persons. *Califano* v. *Goldfarb,* 430 U. S. 199, 213–214 (opinion of BRENNAN, J.).

Nor has Congress made actual dependency on the wage earner either a sufficient or a necessary condition of eligibility in every case.[7] Instead of requiring individualized proof on a case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency.[8] A child who is married or over 18 and neither

[7] No doubt there are many distant relatives and unrelated persons who do not qualify for benefits even though they are actually dependent on a wage earner. Similarly, some married children and some 19-year-old children remain dependent on their parents because they are unable to support themselves while their younger brothers and sisters may be self-sufficient.

[8] The idea that marriage changes dependency is expressed throughout the Social Security Act. Most secondary beneficiaries are eligible only if they have not married or remarried. See 42 U. S. C. § 402 (b)(1)(C) (divorced wives); § 402 (e)(1)(A) (widows); § 402 (f)(1)(A) (widowers); § 402 (g)(1)(A) (surviving or divorced mothers); § 402 (h)(1)(C)

disabled nor a student is denied benefits because Congress has assumed that such a child is not normally dependent on his parents. There is no question about the power of Congress to legislate on the basis of such factual assumptions. General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases. *Weinberger* v. *Salfi*, 422 U. S. 749, 776.

Of course, a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons. Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character.

Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.

Since it was rational for Congress to assume that marital

(parents). With some limited exceptions, §§ 402 (e)(4) and (f)(5), marriage or remarriage marks the end of secondary benefits. §§ 402 (b)(1)(H) (1970 ed., Supp. V), 402 (e)(1), 402 (f)(1), 402 (g)(1), and 402 (h)(1). In each case, however, Congress has excepted marriages to some social security beneficiaries. §§ 402 (b)(3), 402 (e)(3), 402 (f)(4), 402 (g)(3), and 402 (h)(4).

status is a relevant test of probable dependency, the general rule which obtained before 1958, terminating all child's benefits when the beneficiary married, satisfied the constitutional test normally applied in cases like this. See *Mathews* v. *De Castro*, 429 U. S., at 185; *Weinberger* v. *Salfi*, *supra*, and cases cited at 768–770. That general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.[9] For the marriage rule cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group,[10] or as an attempt to interfere with the individual's freedom to make a decision as important as marriage.[11]

The general rule, terminating upon marriage the benefits payable to a secondary beneficiary, is unquestionably valid.

III

The question that remains is whether the 1958 amendment invalidates this general rule by carving out an exception for marriages between beneficiaries.

The exception does create a statutory classification, but it is not as narrow as that described by the District Court. The District Court identified the relevant classification as one distinguishing between (1) the marriage of a disabled bene-

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[9] This proposition is not questioned by appellee. "As a general premise the Secretary undoubtedly correctly concludes it is reasonable to terminate social security payments to child beneficiaries in the event of marriage." Brief for Appellee 21.

[10] See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636; *Jimenez* v. *Weinberger*, 417 U. S. 628; *Loving* v. *Virginia*, 388 U. S. 1.

[11] See *Whalen* v. *Roe*, 429 U. S. 589, 599–600, 603. Congress adopted this rule in the course of constructing a complex social welfare system that necessarily deals with the intimacies of family life. This is not a case in which government seeks to foist orthodoxy on the unwilling by banning, or criminally prosecuting, nonconforming marriages. See *Loving* v. *Virginia*, *supra*. Congress has simply recognized that marriage traditionally brings changed responsibilities.

ficiary to another disabled person who is receiving social security benefits and (2) the marriage of a disabled beneficiary to another disabled person who is not receiving benefits. It is true that persons in the former category are treated more favorably than those in the latter category. It is also true that persons in the latter category may have as great a need for benefits as those in the former category. But it is not correct to conclude, as the District Court did, that only disabled persons are affected by the exception, or that the legislative classification is wholly irrational.

Both the class of persons favored by the 1958 amendment and the class which remains subject to the burdens of the general marriage rule include persons who are not disabled.[12] The broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples. When so judged, both the exception and its limits are valid.

The 1958 amendment reflects a legislative judgment that a marriage between two persons receiving benefits will not normally provide either spouse with protection against the economic hardship that would be occasioned by the termination of benefits. The Secretary submits, and we agree, that it was reasonable for Congress to ameliorate the severity of the earlier rule by protecting both spouses from the dual hardship which it effected.[13]

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[12] As we have seen, the burden of the general marriage rule is not limited to disabled beneficiaries; children, widowers, widows, divorced wives, and parents—all are affected by the rule. And although the District Court singled out for analysis marriages to disabled nonbeneficiaries, Congress did not; Mr. Jobst would also have lost his benefits if he had married an able-bodied woman who was not receiving social security benefits. Finally, the protection extended by the 1958 amendment encompasses many more persons than those described by the District Court. Like the marriage rule itself, the amendment affects widows, widowers, parents, and divorced wives, as well as disabled children. See n. 8, *supra*.

[13] The fact that marriage characteristically signifies the end of a child's

Mr. Jobst argues, however, that the reason for the amendment applies equally to his situation. He urges that his hardship is just as great as that which the amendment avoids when one beneficiary marries another, because his spouse is also disabled. He therefore attacks the exception as irrationally underinclusive.[14] We are persuaded, however, that, even if the benign purpose of the 1958 amendment encompasses this case,[15] legitimate reasons justify the limits that Congress placed on it. See *Richardson* v. *Belcher*, 404 U. S. 78. The exception, like the general rule itself, is simple to

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dependency on parental support justifies a general rule terminating benefits when a child marries. The fact that a marriage between two spouses who are both receiving dependents' benefits does not characteristically signify a similar change in economic status justifies the exception. In other words, since the justifying characteristic of the general class does not apply to the excepted class, the exception rests on a reasonable predicate. This is true even though some members of each class may possess the characteristic more commonly found in the other class.

[14] Even if we were to sustain his attack, and even though we recognize the unusual hardship that the general rule has inflicted upon him, it would not necessarily follow that Mr. Jobst is entitled to benefits. Cf. *Stanton* v. *Stanton*, 421 U. S. 7, 17–18; *Stanton* v. *Stanton*, 429 U. S. 501. For the vice in the statute stems from the exception created by the 1958 amendment; that vice could be cured either by invalidating the entire exception or by enlarging it. Since the choice involves legislation having a nationwide impact, the equities of Mr. Jobst's case would not control. See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1136–1137 (1969). If we were to enlarge the exception, it would be necessary to fashion some new test of need, dependency, or disability. Although the District Court only granted relief for persons marrying a "totally disabled" spouse, its rationale would equally apply to any marriage of a secondary beneficiary to a needy nonbeneficiary.

[15] We note, however, that Congress could have rationally concluded that beneficiaries who marry other beneficiaries present a more compelling case for legislative relief than beneficiaries who marry needy nonbeneficiaries. Secondary beneficiaries who marry each other lose two sets of benefits and thus may suffer a greater loss than does a couple that sacrifices only one set of benefits.

administer. It requires no individualized inquiry into degrees of hardship or need.[16] It avoids any necessity for periodic review of the beneficiaries' continued entitlement. In the cases to which the exception does apply, it is a reliable indicator of probable hardship. Since the test is one that may be applied without introducing any new concepts into the administration of the trust fund,[17] Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489. Even if it might have been wiser to take a larger step, the step Congress did take

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[16] In the very Act that created the exception for marriages between beneficiaries, Congress showed its reluctance to use individualized determinations in allocating social security benefits. The 1958 amendments abolished a requirement that disabled children over 18 prove their individual dependency on the wage earner to qualify for benefits. Pub. L. 85–840 § 306, 72 Stat. 1030. Congress concluded that these beneficiaries should be "deemed dependent" because "the older child who has been totally disabled since before age 18 is also likely to be dependent on his parent." H. R. Rep. No. 2288, 85th Cong., 2d Sess., 17 (1958).

[17] A logical application of Mr. Jobst's position would permit the Secretary to end benefits only after an individual determination of disability or need. Congress, however, has sought to make social security payments independent of individual need, while establishing a separate program to serve those who are needy but ineligible for social security benefits. The Supplemental Security Income program is a federally funded welfare program administered through the Social Security Administration. Its purpose is plainly stated by H. R. Rep. No. 92–231, p. 147 (1971):

"[S]ome people who because of age, disability, or blindness are not able to support themselves through work may receive relatively small social security benefits. Contributory social insurance, therefore, must be complemented by an effective assistance program."

Mr. and Mrs. Jobst became eligible for the Supplemental Security Income program as soon as it was instituted. On remand the parties stipulated that, based on the couple's need, they were receiving monthly payments only $20 less than the amount they would have been receiving if Mr. Jobst's child's benefits had been restored.

was in the right direction and had no adverse impact on persons like the Jobsts.

It is true, as Mr. Jobst urges, that the limited exception may have an impact on a secondary beneficiary's desire to marry, and may make some suitors less welcome than others. But unless Congress should entirely repudiate marriage as a terminating event, that criticism will apply to any limited exception to the general rule. No one suggests that Congress was motivated by antagonism toward any class of marriages or marriage partners not encompassed by the exception. Congress' purpose was simply to remedy the particular injustice that occurred when two dependent individuals married and simultaneously lost their benefits.

We are satisfied that both the general rule and the 1958 exception are legitimate exercises of Congress' power to decide who will share in the benefits of the trust fund. The favored treatment of marriages between secondary beneficiaries does not violate the principle of equality embodied in the Due Process Clause of the Fifth Amendment.

The judgment is reversed.

It is so ordered.

KEY ET AL. *v.* DOYLE ET AL.

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 76-1057. Argued October 5, 1977—Decided November 14, 1977

A law applicable only in the District of Columbia is not a "statute of the United States" for purposes of 28 U. S. C. § 1257 (1), which provides for this Court's appellate review of final judgments rendered by a State's highest court in which a decision could be had where the validity of a statute of the United States is at issue and the decision is against its validity. Consequently, a decision by the District of Columbia Court of Appeals holding unconstitutional a provision of the District of Columbia Code is not reviewable by direct appeal to this Court but only by writ of certiorari pursuant to § 1257 (3). Pp. 61-68.

Appeal dismissed. Reported below: 365 A. 2d 621.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and POWELL, JJ., joined, *post*, p. 68.

Floyd Willis III argued the cause and filed a brief for appellants.

Carl F. Bauersfeld argued the cause for appellees. With him on the brief for appellee Calvary Baptist Church was *Charles H. Burton*. *William A. Glasgow, Stephen A. Trimble,* and *Nicholas D. Ward* filed a brief for appellee St. Matthews Cathedral.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Sallye Lipscomb French died 20 days after executing a will leaving most of her estate to certain churches in the District of Columbia. Section 18-302 of the D. C. Code (1973) voids

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**Leo Pfeffer* and *Paul S. Berger* filed a brief for the American Jewish Congress as *amicus curiae* urging affirmance.

religious devises and bequests made within 30 days of death.[1] Prevented by this statutory provision from carrying out the terms of the will, appellee Doyle as executor sought instructions in the Probate Division of the Superior Court of the District of Columbia. Both that court and the District of Columbia Court of Appeals held the statute unconstitutional.[2] The decedent's heirs and next of kin brought an appeal to this

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[1] Section 18–302 states:

"A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator."

This provision originated in the Organic Act of 1801, 2 Stat. 103, ch. 15, § 1. It was amended by Congress as recently as 1965. 79 Stat. 688.

[2] The Superior Court opinion is unpublished. The opinion of the Court of Appeals appears at *Estate of French*, 365 A. 2d 621 (1976).

Stressing that the statute "is directed only to religious groups and practitioners," the Superior Court held the statute to be "an invalid infringement of the free exercise of religion provisions of the First Amendment" and "invalid as a denial of due process guaranteed by the Fifth Amendment."

The D. C. Court of Appeals invalidated the statute only under the Due Process Clause of the Fifth Amendment. The majority concluded "that the classification established by §18–302 [religious legatees versus all others] has no rational relationship to the purpose of the legislation and hence denies religious legatees equal protection of the law." *Id.*, at 624.

Six States have somewhat similar statutes, although none of them is restricted to religious bequests and devises. Fla. Stat. § 732.803 (1976); Ga. Code § 113–107 (1975); Idaho Code § 15–2–615 (Supp. 1977); Miss. Code Ann. § 91–5–31 (1973); Mont. Rev. Codes Ann. § 91–142 (1964); Ohio Rev. Code Ann. § 2107.06 (1976). As stated above, the D. C. statute's singular focus on religious beneficiaries is apparently what prompted the Superior Court and the Court of Appeals to declare it unconstitutional. Thus the decisions of the trial and appellate courts in this case do not necessarily raise doubts about the constitutionality of the somewhat similar statutes of the other six jurisdictions.

Court under 28 U. S. C. § 1257 (1), which provides for review by appeal in cases "where is drawn in question the validity of a . . . statute of the United States and the decision is against its validity." [3] We postponed consideration of the question of our appellate jurisdiction to the hearing of the case on the merits. 430 U. S. 929. Because we conclude that a law applicable only in the District of Columbia is not a "statute of the United States" for purposes of 28 U. S. C. § 1257 (1), we dismiss the appeal for lack of jurisdiction.

Before 1970 the judgments of the trial courts of the District of Columbia were appealable to the United States Court of Appeals.[4] Ultimate review in this Court was available under 28 U. S. C. § 1254, which was applicable to all of the 11

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[3] Title 28 U. S. C. § 1257 states:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

[4] The jurisdiction of the local courts substantially overlapped that of the federal courts in the District before 1970. See *Palmore* v. *United States*, 411 U. S. 389, 392 n. 2 (1973). Appeals from all these courts were channeled through the Court of Appeals for the District of Columbia, which became the United States Court of Appeals for the District of Columbia Circuit in 1934. Ch. 426, 48 Stat. 926.

Federal Courts of Appeals.[5] A right of appeal to this Court from the United States Court of Appeals for the District of Columbia Circuit thus existed only where that court had

[5] Title 28 U. S. C. § 1254 states:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

"(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

Section 1254 was largely derived from §§ 239 and 240 of the Judiciary Act of 1925, 43 Stat. 938.

Before 1925, there was a right of appeal to the Supreme Court from the Court of Appeals of the District of Columbia (predecessor to the United States Court of Appeals) in cases involving the constitutionality of local statutes, but not in cases involving the construction of local statutes. This rule arose from a somewhat strained construction given the jurisdictional statute of 1911, 36 Stat. 1159, § 250. Paragraph three of that section provided for appeals from the District's courts in "cases involving . . . the constitutionality of any law of the United States . . . ." Paragraph six provided for appeals in "cases in which the construction of any law of the United States is drawn in question by the defendant." The Court construed the same words—"any law of the United States"—differently in the two paragraphs.

In *American Security & Trust Co.* v. *District of Columbia Comm'rs*, 224 U. S. 491 (1912), the Court concluded that a congressional Act applicable solely to the District of Columbia was not a "law of the United States" for purposes of paragraph six. Mr. Justice Holmes' opinion for the Court reasoned that "all cases in the District arise under acts of Congress and probably it would require little ingenuity to raise a question of construction in almost any one of them." By restricting paragraph six to

invalidated a state statute. All other cases, including those challenging the validity of local statutes of the District of Columbia, were reviewable here by writ of certiorari.[6]

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laws of national scope, the Court thought that its jurisdiction would be "confined to what naturally and properly belongs to it." *Id.*, at 494–495.

In *Heald* v. *District of Columbia*, 254 U. S. 20 (1920), the Court construed paragraph three to allow appeals in cases involving the constitutionality of local statutes. This paragraph re-enacted "provisions of prior statutes which had been construed as conveying authority to review controversies concerning the constitutional power of Congress to enact local statutes." *Id.*, at 22–23. Although it meant interpreting the identical words in the same jurisdictional statute in different ways, the Court held that the prior construction should continue "in the absence of plain implication to the contrary." *Id.*, at 23.

[6] Or by certification. See 28 U. S. C. § 1254 (3), set out in n. 5, *supra*. Some cases arising in the District reached this Court by routes other than § 1254. In *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), the Court heard direct appeals from several three-judge District Court decisions, one of them a decision in the District of Columbia holding a D. C. Code provision unconstitutional. After noting that 28 U. S. C. § 2282 (which has since been repealed) required a three-judge court to hear a challenge to the constitutionality of "*any* Act of Congress," the Court without further discussion concluded that it saw "no reason to make an exception for Acts of Congress pertaining to the District of Columbia." 394 U. S., at 625 n. 4.

In *United States* v. *Vuitch*, 402 U. S. 62 (1971), the Court reviewed a District Court judgment holding a criminal provision of the D. C. Code unconstitutional. The United States had taken a direct appeal to the Supreme Court under 18 U. S. C. § 3731 (1964 ed.), which had been recently amended, but which was still applicable to that case. Section 3731 allowed direct appeals "in all criminal cases . . . dismissing any indictment . . . where such decision . . . is based upon the invalidity . . . of the statute upon which the indictment . . . is founded." By a margin of 5–4, the Court held that the word "statute" in § 3731 encompassed D. C. Code provisions. Stressing the nationwide confusion surrounding criminal statutes like the one in question, the Court reasoned that the purpose underlying § 3731 "would not be served by our refusing to decide this case now after it has been orally argued." 402 U. S., at 66. Writing for the four dissenters, Mr. Justice Harlan attributed the Court's expansive

The District of Columbia Court Reform and Criminal Procedure Act of 1970 [7] substantially modified the structure and jurisdiction of the courts in the District, but there is no indication that Congress intended these changes to enlarge the right of appeal to this Court from the courts of that system. The aim of the Act was to establish "a Federal-State court system in the District of Columbia analogous to court systems in the several States." H. R. Rep. No. 91–907, p. 35 (1970). The Act provided that cases would no longer have to proceed from the local courts to the United States Court of Appeals, and then to this Court under § 1254. Instead, the judgments of the newly created local Court of Appeals were made directly reviewable here, like the judgments of state courts.[8] Accordingly, § 1257, the jurisdictional provision concerning Supreme Court review of state-court decisions, was amended to include the District of Columbia Court of Appeals as "the highest court of a State." [9]

In *Palmore* v. *United States*, 411 U. S. 389 (1973), we recognized that the analogy between the local courts of the District and the courts of the States was not perfect. Although Congress had expressly classified the District of Columbia Court of Appeals as a state court, it had not indicated that D. C. Code provisions should be treated as state statutes. Thus, where the District of Columbia courts had upheld a

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reading of this jurisdictional provision to the fact that it had been amended and would have no effect upon subsequent cases. *Id.*, at 93.

In both these cases, the Court concluded that D. C. Code provisions were federal statutes for purposes of the applicable appellate provisions. However, each jurisdictional provision is to be interpreted in the light of its own antecedents, purposes, and context. See *American Security & Trust Co.* v. *District of Columbia Comm'rs*, *supra*. The special circumstances of these two cases thus render them of little aid in the task of construing § 1257 (1).

[7] 84 Stat. 473.

[8] 84 Stat. 475, § 111.

[9] 84 Stat. 590, § 172. See n. 3, *supra*.

local statute against constitutional attack, we concluded that an appeal as of right would not lie to this Court under § 1257 (2), which applies to state-court decisions rejecting constitutional challenges to state statutes. Underlying our decision was the long-established principle that counsels a narrow construction of jurisdictional provisions authorizing appeals as of right to this Court, in the absence of clear congressional intent to enlarge the Court's mandatory jurisdiction. 411 U. S., at 396.

The legislative history of the 1970 Act is as unenlightening about the applicability of § 1257 (1) as it is about that of § 1257 (2). In the Senate Committee hearings on an early version of the Act, there was one brief reference to § 1257:

> "The Chairman [Senator Tydings]. . . . On page 3, section 11–102 there is a provision relating to appeal:
>
> " 'The highest court of the District of Columbia is the District of Columbia Court of Appeals. For purposes of *appeal* to the Supreme Court and other purposes of law, it shall be deemed the highest court of the state.' [Emphasis added.]
>
> "Now, my question to you is a question raised about that language. Is that sufficiently broad to allow the Supreme Court review by certiorari?
>
> "Mr. Kleindienst. We believe so.
>
> "The Chairman. As well as appeal pursuant to 28 U. S. C. 12750 [*sic*]? Because the language, you know, leaves out certiorari. Certiorari is an important vehicle to reach the Supreme Court.
>
> "Mr. Kleindienst. We believe the language covers certiorari but it would be easy to clarify." [10]

[10] Hearings on S. 1066, S. 1067, S. 1214, S. 1215, S. 1711, and S. 2601 (Reorganization of the District of Columbia Courts) before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 1159 (1969). The draft of the bill offered by the administration apparently had used the word "appeal"

Although Senator Tydings seems to have assumed that both the appeal and certiorari provisions of § 1257 would apply to the judgments of the District of Columbia Court of Appeals, it is not clear whether he thought the appeal provision of § 1257 (1) or that of § 1257 (2) would govern. And if he had in mind § 1257 (1), he made no reference to possible distinctions between federal statutes of solely local concern and those of broader scope. Nowhere in the legislative history do we find further discussion of this point.

The omission is understandable. The question had not arisen before the 1970 reorganization because § 1257 then applied only to state courts, which seldom if ever confronted federal statutes of wholly local application. Although the courts of the District were accustomed to seeing such federal statutes, the jurisdictional provision that applied to them did not mention "statutes of the United States." Rather, § 1254 divides cases from the courts of appeals into two categories—those invalidating state statutes and all others.

Although the precise question at issue in this case thus seems to have escaped the attention of Congress, it was clear that a general right of appeal from the District of Columbia courts to this Court on questions concerning the validity of local law did not exist at the time of the 1970 reorganization.[11] In the absence of an express provision so ordaining, it cannot be assumed that Congress intended to enlarge this Court's mandatory appellate jurisdiction by simply shifting review of District of Columbia court judgments from § 1254 to § 1257.[12]

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in the broad sense of direct review. The provision was later revised to reflect that intention:

"Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code." 84 Stat. 475.

[11] Cf. n. 6, *supra*.

[12] As part of the 1970 Court Reform Act, Congress enacted 28 U. S. C. § 1363, which provides:

"For the purposes of this chapter, references to laws of the United States

Indeed, the purposes of the 1970 Act strongly imply the contrary. As we noted in *Palmore*, Congress intended "to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction." 411 U. S., at 409.

This Court's mandatory appellate jurisdiction over state-court judgments under § 1257 is reserved for cases threatening the supremacy of federal law. When state courts invalidate state statutes on federal grounds, uniformity of national law is not threatened and there is no automatic right of appeal to

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or Acts of Congress do not include laws applicable exclusively to the District of Columbia."

Chapter 85 of Title 28, to which § 1363 refers, governs the jurisdiction of the United States district courts. The enactment of this section hardly implies that Congress must have intended that references to "laws of the United States" found in all other jurisdictional chapters and sections (including § 1257) *would* include provisions of the D. C. Code.

Before 1970, the district courts had jurisdiction over some cases arising under D. C. Code provisions. See n. 4, *supra*. This jurisdiction rested on three jurisdictional provisions of the D. C. Code (§§ 11–521, 11–522, 11–523 (1967)) and on various jurisdictional provisions found in ch. 85, many of which referred to "statutes of the United States" or "Acts of Congress." The 1970 Act repealed these three jurisdictional provisions of the D. C. Code and also enacted 28 U. S. C. § 1363 as a conforming amendment to assure the removal from the jurisdiction of the District Court for the District of Columbia of those cases arising under D. C. Code provisions. In view of its limited focus, the enactment of § 1363 cannot rationally support the inference that Congress examined other jurisdictional provisions and decided, as to them, that references to "statutes of the United States" *should* include D. C. Code provisions. Such an inference would be especially tenuous if applied to § 1257, because § 1257 did not previously govern cases questioning the validity of D. C. Code provisions. See *supra*, at 66. In any event, a clearer indication of congressional intent than this sort of negative implication is required to extend this Court's mandatory appellate jurisdiction.

this Court. From the analogy of the local D. C. courts to state courts drawn by Congress in the 1970 Act, it follows that no right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application.[13] From such judgments and from similar state-court judgments, there is no appeal to this Court, but only review by writ of certiorari according to the terms of § 1257 (3).[14]

This construction of § 1257 (1) neither enlarges nor reduces this Court's mandatory appellate jurisdiction as a result of the 1970 Act. It gives litigants in the courts of the District the same right of review in this Court as is enjoyed by litigants in the courts of the States.

For the reasons expressed in this opinion, the appeal is dismissed for lack of jurisdiction.[15]

It is so ordered.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

In *Palmore* v. *United States*, 411 U. S. 389 (1973), this Court held that provisions of the District of Columbia Code enacted by the United States Congress were not "state laws" within the meaning of 28 U. S. C. § 1257 (2) and that a decision of the D. C. Court of Appeals upholding such provisions was reviewable in this Court only on certiorari. Today, this Court holds that an Act of Congress relating exclusively to the

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[13] It is more the nature of the D. C. Code than its limited geographical impact that distinguishes it from other federal statutes. Unlike most congressional enactments, the Code is a comprehensive set of laws equivalent to those enacted by state and local governments having plenary power to legislate for the general welfare of their citizens.

[14] Of course, 1257 (1) would be applicable if the District of Columbia Court of Appeals should invalidate a federal law other than a provision of the D. C. Code.

[15] Treating "the papers whereon the appeal was taken . . . as a petition for writ of certiorari," 28 U. S. C. § 2103, we deny the petition. See n. 2, *supra*.

District of Columbia is also not a "statute of the United States" within the meaning of 28 U. S. C. § 1257 (1). Thus, even where the D. C. Court of Appeals strikes down such a congressional enactment on federal constitutional grounds, there is no right of direct appeal to this Court, review being limited to this Court's discretionary acceptance of a writ of certiorari. Because I believe that this holding is inconsistent with the prior decisions of this Court and contrary to the congressional scheme determining Supreme Court jurisdiction, I dissent from the majority opinion.

I

In the early years of the judicial system, all cases from the federally created court in the District of Columbia involving more than a specified jurisdictional amount were appealable to the United States Supreme Court.[1] In 1885, the jurisdictional amount was raised to $5,000, but special provision was made for appeal without regard to the sum in dispute in

> "any case . . . in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States . . . ." Ch. 355, 23 Stat. 443.

Since the enactment of this statute, this Court has consistently held that a constitutional attack upon a congressional enactment relating exclusively to the District of Columbia draws into question a "statute" or "law" of the United States within the meaning of the relevant jurisdictional statute.

This view underlies the opinion in *Baltimore & Potomac R. Co.* v. *Hopkins,* 130 U. S. 210 (1889), in which an absence of jurisdiction was found for another reason.[2] It was made

[1] See 2 Stat. 106 (judgments of the Circuit Court of the District of Columbia in excess of $100 could be reviewed by appeal or writ of error); ch. 39, 3 Stat. 261 (raising jurisdictional amount to $1,000); 12 Stat. 764 (decisions of the Supreme Court of the District of Columbia, which replaced the Circuit Court, would be reviewable on the same basis).

[2] The Court found that the validity of the Act involved there had not been drawn into question.

explicit in *Parsons* v. *District of Columbia*, 170 U. S. 45 (1898), in which the Court upheld its jurisdiction over a challenge to a congressional scheme for water main assessments in the District of Columbia. "[W]e think it plainly appears," the Court stated, "that the validity of statutes of the United States and of an authority exercised under the United States was drawn into question in the court below . . . ." *Id.*, at 50. Accord, *Smoot* v. *Heyl*, 227 U. S. 518 (1913) (upholding Supreme Court jurisdiction over a challenge to the validity of a District of Columbia party-wall regulation).

In 1911 the Congress abolished this Court's jurisdiction over appeals from the District of Columbia predicated on jurisdictional amount, but added a provision for appeal in cases in which "the construction of any law of the United States is drawn in question by the defendant." 36 Stat. 1159. In *American Security & Trust Co.* v. *District of Columbia Comm'rs*, 224 U. S. 491 (1912), the Court construed this provision not to include laws pertaining exclusively to the District of Columbia, because the alternative construction would have defeated the congressional purpose "to effect a substantial relief to this court from indiscriminate appeals where a sum above $5,000 was involved." *Id.*, at 495. Nevertheless, the Court noted that "there is no doubt that the special act of Congress was in one sense a law of the United States" and the Court's opinion distinguished the statutory provision pertaining to appeals in "Cases involving the constitutionality of any law of the United States."

In *Heald* v. *District of Columbia*, 254 U. S. 20 (1920), the Court squarely held once again that a constitutional attack on a federal statute pertaining exclusively to the District of Columbia drew into question the validity of a "law of the United States" within the meaning of the appeal statute. The Court explicitly rejected the suggestion that *American Security & Trust Co.* was controlling, since that case itself had recognized a "difference between the two subjects." 254 U. S.,

at 22. The Court also noted that the current appeal statute had been intended to "reenact provisions of prior statutes which had been construed as conveying authority to review controversies concerning the constitutional power of Congress to enact local statutes." *Id.*, at 22–23, citing *Parsons* v. *District of Columbia, supra,* and *Smoot* v. *Heyl, supra.* Since the *Heald* decision, this Court has not commented further on the issue raised therein,[3] but commentators have concluded that a "federal statute, for purposes of § 1257 (1), plainly means enactments by the Congress of the United States, including those which are limited in operation to the District of Columbia . . . ." R. Stern & E. Gressman, Supreme Court Practice 82 (4th ed. 1969). Accord, Boskey, Appeals from State Courts under the Federal Judicial Code, 30 Va. L. Rev. 57, 59 (1943).[4]

II

It was against this background that Congress enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970. 84 Stat. 473. It established a separate court

[3] Between 1925 and 1970 all cases from local District of Columbia courts were channeled through the Court of Appeals for the District of Columbia, which later became the United States Court of Appeals for the District of Columbia Circuit. See *ante,* at 61 n. 4. Since that court was clearly a federal court composed of judges tenured under Art. III of the Constitution, there was no need for mandatory review of decisions of that court invalidating federal statutes. Hence its decisions were reviewable in this Court on the same basis as the decisions of the other federal courts of appeals. 43 Stat. 938.

[4] As the majority recognizes, see *ante,* at 63–64, n. 6, this Court has recently ruled in other contexts that D. C. Code provisions are "statutes of the United States," *United States* v. *Vuitch,* 402 U. S. 62 (1971) (criminal appeal statute), and "Acts of Congress," *Shapiro* v. *Thompson,* 394 U. S. 618 (1969) (three-judge court appeals). While these decisions may not be directly relevant here, they confirm the traditional understanding that—in the absence of contrary congressional command—congressional enactments dealing with the District of Columbia are to be treated like other federal laws.

system for the District of Columbia, headed by the District of Columbia Court of Appeals. Appeals from that court to the United States Supreme Court were to be regulated by 28 U. S. C. § 1257, which was amended to provide:

> "For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

The Act also included a provision specifying that for purposes of determining the original jurisdiction of the district courts, "references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia." 28 U. S. C. § 1363, added by § 172 (c)(1) of the Reorganization Act, 84 Stat. 590. No proviso was added to 28 U. S. C. § 1257 (1) to indicate that the reference to "statute of the United States" in that provision was not to include federal laws pertaining to the District of Columbia.

The clear implication of Congress' action with respect to § 1257 was that statutes relating to the District of Columbia would continue to be viewed, as they had been in the past, as statutes of the United States. Although Congress amended § 1257, characterizing the District of Columbia Court of Appeals as a "state court," it did not also insert a restrictive provision similar to that limiting the jurisdiction of the district courts with respect to D. C. Code provisions. The legislative history gives no indication that Congress disagreed with the prior decisions of this Court holding that a constitutional attack upon a federal law local in operation would be viewed as a challenge to a "statute" or "law of the United States" within the meaning of the applicable appeal statute. In these circumstances, one can only conclude that the Congress intended that decisions invalidating laws concerning the District of Columbia would receive the same scrutiny from this Court as decisions invalidating other federal laws.[5]

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[5] The majority argues that, as of 1970, no general right of appeal

This Court's decision in *Palmore* v. *United States,* 411 U. S. 389 (1973), supports—if indeed it does not require—that conclusion. The Court there held that provisions of the District of Columbia Code enacted by Congress were not "statutes of a state" within the meaning of § 1257 (2) and that D. C. court decisions upholding these laws would be reviewable only on certiorari. The Court reasoned:

> "We are entitled to assume that in amending § 1257, Congress legislated with care, and that had Congress intended to equate the District Code and state statutes for the purposes of § 1257, it would have said so expressly and not left the matter to mere implication." 411 U. S., at 395.

The Court suggested that an express provision " 'would have been easy,' " *id.,* at 395 n. 5, quoting *Farnsworth* v. *Montana,*

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existed from District of Columbia courts to this Court in constitutional challenges to D. C. Code provisions and that "it cannot be assumed that Congress intended to enlarge this Court's mandatory appellate jurisdiction by simply shifting review of District of Columbia court judgments from § 1254 to § 1257." *Ante,* at 66. This argument is flawed for two reasons. First, as the majority opinion itself concedes, the shift from § 1254 to § 1257 *did* enlarge this Court's mandatory appellate jurisdiction, by including cases arising in the District of Columbia which invalidated federal statutes of national scope. See *ante,* at 68 n. 14. Second, and more importantly, the shift in review provisions was not a "simple" or technical change, but rather basic to the whole concept of the D. C. court reorganization. The law established the District of Columbia court system as an independent, local court system. Congress amended § 1257 to make that point unmistakably clear. By virtue of inclusion within § 1257, the decisions of the District of Columbia Court of Appeals would no longer be filtered through the United States Court of Appeals, but would be appealable as state decisions to the United States Supreme Court. Since the scope of appellate jurisdiction specified by § 1257 for state-court decisions is different from that provided under § 1254 for decisions of the United States courts of appeals, there can be little doubt that Congress effected a change in this Court's mandatory appellate jurisdiction.

129 U. S. 104, 113 (1889), and pointed out several exceptions for the District of Columbia within the Federal Judicial Code, including the provision added by the 1970 Act excluding federal statutes relating to the District of Columbia from the original jurisdiction of the district courts.

This reasoning obviously applies with even greater force to the language of § 1257 (1). Had Congress wished to exclude laws relating to the District of Columbia, it could have used almost precisely the same device as was used with respect to district court jurisdiction. "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " *Palmore* v. *United States, supra,* at 396, quoting *Cheng Fan Kwok* v. *INS,* 392 U. S. 206, 212 (1968).

Read together with *Palmore,* the effect of this Court's decision is to put District of Columbia statutes in a unique class: They are neither statutes of a State nor statutes of the United States. Whether the District of Columbia Court of Appeals upholds them or strikes them down, there is no appeal to this Court. If Congress had intended that its enactments relating to the District of Columbia were to be treated as mongrel statutes, distinct from the recognized classifications of the Judicial Code, it would surely have said so.[6]

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[6] The majority's construction of "statute of the United States" in § 1257 (1) is also disturbing because it may ultimately undermine this Court's certiorari jurisdiction over cases from the D. C. Court of Appeals. The majority does not explain its rationale for assuming certiorari jurisdiction in this case. Presumably it views this case as one in which a "right" has been "specially set up or claimed under the Constitution" within the meaning of § 1257 (3). However, in cases involving the *construction* of federal laws dealing with the District of Columbia, that approach would not be available. While there is provision in § 1257 (3) for cases in which the right is derived from a "statute" of the United States, invocation of that provision would require that the Court interpret identical words in the jurisdictional statute in two different ways, a practice the majority evidently disapproves. See *ante,* at 62–63, n. 5. Thus, this

III

Appellee St. Matthew's Cathedral recognizes that this Court's mandatory jurisdiction over appeals of state decisions invalidating federal laws was designed to assure that national legislation would not erroneously be set aside by local courts. Appellee argues that there is no necessity for such review of the decisions of the District of Columbia Court of Appeals because "it is an Article I court over which Congress has plenary power." Brief for Appellee St. Matthew's Cathedral 11. I have some doubt as to whether that power could or should be used in the manner that appellee appears to contemplate. In any event, Congress, in amending § 1257, has made clear that the District of Columbia Court of Appeals should be regarded as the "highest court of a State." Appellee's argument, which is predicated on the notion that the District of Columbia Court of Appeals is a type of federal court, must therefore be rejected.

Nor do I agree that we should view federal legislation relating to the District of Columbia as not sufficiently national in significance to merit mandatory review. We are not free to disregard § 1257 (1). Moreover, the clause giving the Congress power to legislate for the District of Columbia stands beside the other enumerated powers of Congress in Art. I, § 8, of the United States Constitution. " 'The object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation.' " *O'Donoghue* v. *United States*, 289 U. S. 516, 539–540 (1933), quoting *Grether* v. *Wright*, 75 F. 742, 756–757

Court may ultimately be left with no jurisdiction whatsoever over cases in which the D. C. Court of Appeals construes a federal statute dealing with the District of Columbia. It is highly improbable that Congress would have given such free rein in interpreting federal laws to a court which it regarded as "the highest court of a State" or that it would have so restricted this Court's appellate jurisdiction without expressly saying so.

(CA6 1896) (Taft, J.). Though today the District of Columbia has a measure of home rule, the United States retains important interests in the District of Columbia, ranging from extensive federal property to the welfare of hundreds of thousands of federal employees. That the statute involved in this case is narrow in scope should not be permitted to camouflage the Nation's vital interest in the validity of laws governing its Capital.[7]

I can see no reason for denying mandatory jurisdiction of constitutional challenges to D. C. Code provisions other than the general need to lessen the number of cases heard by this Court. While this may be a worthy objective, it should be effectuated by statutory amendment, not strained construction. Jurisdiction is not a handy tool for carving a workload of acceptable size and shape, but a solemn obligation imposed by the Congress and enforceable by every deserving litigant. Because I believe that the Court here shirks that duty, I dissent from the opinion of the Court.

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[7] The majority opinion argues that no appeal is needed in the circumstances of this case because the "uniformity of national law is not threatened" when a local court invalidates a federal law "of exclusively local application." See *ante*, at 67, 68. But there are a great number of federal laws which, though applicable only to a limited area, deal with a vital national interest. *E. g.*, Point Reyes National Seashore Act of 1976, 90 Stat. 2515 (designating as wilderness 33,000 acres of land in California). Just as an appeal is allowed to protect these statutes against constitutional attack, an appeal should be allowed for federal legislation dealing with the Nation's Capital.

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* KOWALSKI ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76–1095. Argued October 12, 1977—Decided November 29, 1977

New Jersey provides a cash meal allowance for its state police troopers, which is paid biweekly in advance in an amount varying with the trooper's rank and is included, although separately stated, with his salary and in his gross pay for purposes of calculating pension benefits. Although troopers are required to remain on call in their assigned patrol areas during their midshift break, they are not required to eat lunch at any particular location, and indeed may eat at home, nor are they required to spend the meal allowance on food. No reduction in the allowance is made for periods when a trooper is not on patrol. Respondents, a trooper and his wife, included only a part of the meal allowances received by the trooper in their 1970 federal income tax return and the Commissioner assessed a deficiency with respect to the remainder. The respondents argued in the Tax Court that the allowance was not income within § 61 (a) of the Internal Revenue Code of 1954, which defines gross income as "all income from whatever source derived, including (but not limited to) . . . (1) Compensation for services, including fees, commissions, and similar items." In the alternative, they argued that the allowances were excludable from § 61 income because of § 119 of the Code, which creates an exclusion for "the value of any meals . . . furnished to [an employee] by his employer for the convenience of the employer, but only if . . . the meals are furnished on the business premises of the employer," and further provides that "[in] determining whether meals are furnished . . . for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals . . . are intended as compensation." The Tax Court rejected both contentions, but the Court of Appeals reversed. *Held:*

1. In the absence of a specific exemption, the cash meal-allowance payments are included in gross income under § 61 (a), since they are "undeniabl[y] accessions to wealth, clearly realized, and over which the [trooper has] complete dominion." *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 431. Pp. 82–84.

2. The payments are not subject to exclusion from gross income under

§ 119, since § 119, by its terms, covers *meals* furnished by the employer and not *cash* reimbursements for meals. P. 84.

3. No specific exemption for the payments can be claimed on the basis of the once-recognized doctrine that benefits conferred by an employer on an employee "for the convenience of the employer" are not income within the meaning of the Internal Revenue Code, since it appears from the legislative history of § 119 that it was intended comprehensively to modify the prior law, both expanding and contracting the exclusion for meals previously provided, and therefore it must be construed as a replacement for the prior law, designed to end the confusion that had developed respecting the convenience-of-the-employer doctrine as a determinant of the tax status of meals. Pp. 84–95.

544 F. 2d 686, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 96.

Stuart A. Smith argued the cause for petitioner. With him on the brief were *Solicitor General McCree* and *Acting Assistant Attorney General Baum.*

Carl B. Cordes argued the cause for respondents. With him on the brief was *Herrick K. Lidstone.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether cash payments to state police troopers, designated as meal allowances, are included in gross income under § 61 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 61 (a),[1] and, if so, are otherwise excludable under § 119 of the Code, 26 U. S. C. § 119.[2]

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[1] "§ 61. Gross income defined.

"(a) General definition.

"Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

"(1) Compensation for services, including fees, commissions, and similar items . . . ."

[*Footnote 2 is on p. 79*]

I

The pertinent facts are not in dispute. Respondent [3] is a state police trooper employed by the Division of State Police of the Department of Law and Public Safety of the State of New Jersey. During 1970, the tax year in question, he received a base salary of $8,739.38, and an additional $1,697.54 [4] designated as an allowance for meals.

The State instituted the cash meal allowance for its state police officers in July 1949. Prior to that time, all troopers were provided with midshift [5] meals in kind at various meal stations located throughout the State. A trooper unable to eat at an official meal station could, however, eat at a restaurant and obtain reimbursement. The meal-station system proved unsatisfactory to the State because it required troopers to leave their assigned areas of patrol unguarded for extended

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[2] "§ 119. Meals or lodging furnished for the convenience of the employer.

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

"(1) in the case of meals, the meals are furnished on the business premises of the employer . . . .

"In determining whether meals . . . are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation."

[3] References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski, also a respondent, is a party solely because she filed a joint return with her husband for the 1970 tax year.

[4] Respondent was entitled to $1,740 in meal allowances, see n. 7, *infra*, but for reasons not disclosed by the record received the lesser amount.

[5] While on active duty, New Jersey troopers are generally required to live in barracks. Meals furnished in kind at the barracks before or after a patrol shift are not involved in this case. Nor is the meal allowance intended to pay for meals eaten before or after a shift in those instances in which the trooper is not living in the barracks. However, because of the duration of some patrols, a trooper may be required to eat more than one meal per shift while on the road.

periods of time. As a result, the State closed its meal stations and instituted a cash-allowance system. Under this system, troopers remain on call in their assigned patrol areas during their midshift break. Otherwise, troopers are not restricted in any way with respect to where they may eat in the patrol area and, indeed, may eat at home if it is located within that area. Troopers may also bring their midshift meal to the job and eat it in or near their patrol cars.

The meal allowance is paid biweekly in advance and is included, although separately stated, with the trooper's salary. The meal-allowance money is also separately accounted for in the State's accounting system. Funds are never commingled between the salary and meal-allowance accounts. Because of these characteristics of the meal-allowance system, the Tax Court concluded that the "meal allowance was not intended to represent additional compensation." 65 T. C. 44, 47 (1975).

Notwithstanding this conclusion, it is not disputed that the meal allowance has many features inconsistent with its characterization as a simple reimbursement for meals that would otherwise have been taken at a meal station. For example, troopers are not required to spend their meal allowances on their midshift meals, nor are they required to account for the manner in which the money is spent. With one limited exception not relevant here,[6] no reduction in the meal allowance is made for periods when a trooper is not on patrol because, for example, he is assigned to a headquarters building or is away from active duty on vacation, leave, or sick leave. In addition, the cash allowance for meals is described on a state police recruitment brochure as an item of salary to be received in addition to an officer's base salary and the amount of the meal allowance is a subject of negotiations between the State and the police troopers' union. Finally, the amount of an officer's

[6] The amount of the allowance is adjusted only when an officer is on military leave.

cash meal allowance varies with his rank [7] and is included in his gross pay for purposes of calculating pension benefits.

On his 1970 income tax return, respondent reported $9,066 in wages. That amount included his salary plus $326.45 which represented cash meal allowances reported by the State on respondent's Wage and Tax Statement (Form W–2).[8] The remaining amount of meal allowance, $1,371.09, was not reported. On audit, the Commissioner determined that this amount should have been included in respondent's 1970 income and assessed a deficiency.

Respondent sought review in the United States Tax Court, arguing that the cash meal allowance was not compensatory but was furnished for the convenience of the employer and hence was not "income" within the meaning of § 61 (a) and that, in any case, the allowance could be excluded under § 119. In a reviewed decision, the Tax Court, with six dissents,[9] held that the cash meal payments were income within the meaning of § 61 and, further, that such payments were not excludable under § 119.[10] 65 T. C. 44 (1975). The Court of Appeals for

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[7] Troopers, such as respondent, and other noncommissioned officers received $1,740 per year; lieutenants and captains received $1,776, majors $1,848, and the Superintendent $2,136.

[8] On October 1, 1970, the Division of State Police began to withhold income tax from amounts paid as cash meal allowances. No claim has been made that the change in the Division's withholding policy has any relevance for this case.

[9] A seventh judge concurred in the majority opinion with respect to §§ 61 and 119, but dissented on the ground that the meal allowance was deductible under § 162 (a) of the Code, see n. 30, *infra*, as "ordinary and necessary expenditures required as a part of petitioner's duties." 65 T. C., at 63. Since respondent has not made this contention here, we have no occasion to consider it.

[10] The Tax Court also determined that amounts of meal allowance attributable to respondent's expenses while "away from home" as defined in § 162 (a) (2) of the Code, see n. 30, *infra*, were properly deducted from respondent's income as travel expenses. See *United States* v. *Correll*, 389 U. S. 299 (1967). The Commissioner did not appeal from this holding.

the Third Circuit, in a *per curiam* opinion, held that its earlier decision in *Saunders* v. *Commissioner*, 215 F. 2d 768 (1954), which determined that cash payments under the New Jersey meal-allowance program were not taxable, required reversal. 544 F. 2d 686 (1976). We granted certiorari to resolve a conflict among the Courts of Appeals on the question.[11] 430 U. S. 944 (1977). We reverse.

II

A

The starting point in the determination of the scope of "gross income" is the cardinal principle that Congress in creating the income tax intended "to use the full measure of its taxing power." *Helvering* v. *Clifford*, 309 U. S. 331, 334 (1940); accord, *Helvering* v. *Midland Mutual Life Ins. Co.*, 300 U. S. 216, 223 (1937); *Douglas* v. *Willcuts*, 296 U. S. 1, 9 (1935); *Irwin* v. *Gavit*, 268 U. S. 161, 166 (1925). In applying this principle to the construction of § 22 (a) of the Internal Revenue Code of 1939[12] this Court stated that "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature[, but intended] to tax all

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[11] See *Wilson* v. *United States*, 412 F. 2d 694 (CA1 1969) (troopers' subsistence allowance taxable); *United States* v. *Keeton*, 383 F. 2d 429 (CA10 1967) (*per curiam*) (troopers' subsistence allowance nontaxable); *United States* v. *Morelan*, 356 F. 2d 199 (CA8 1966) (same); *United States* v. *Barrett*, 321 F. 2d 911 (CA5 1963) (same); *Magness* v. *Commissioner*, 247 F. 2d 740 (CA5 1957) (troopers' subsistence allowance taxable), cert. denied, 355 U. S. 931 (1958); *Saunders* v. *Commissioner*, 215 F. 2d 768 (CA3 1954) (troopers' meal allowance nontaxable). See also *Ghastin* v. *Commissioner*, 60 T. C. 264 (1973) (troopers' subsistence allowance taxable); *Hyslope* v. *Commissioner*, 21 T. C. 131 (1953) (troopers' meal allowance taxable).

[12] 53 Stat. 9, as amended, ch. 59, 53 Stat. 574. This section provided:

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, . . . or gains or profits and *income derived from any source whatever.*" (Emphasis added.)

gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 429–430 (1955), citing *Commissioner* v. *Jacobson*, 336 U. S. 28, 49 (1949), and *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87–91 (1934). Although Congress simplified the definition of gross income in § 61 of the 1954 Code, it did not intend thereby to narrow the scope of that concept. See *Commissioner* v. *Glenshaw Glass Co., supra*, at 432, and n. 11; H. R. Rep. No. 1337, 83d Cong., 2d Sess., A18 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 168 (1954).[13] In the absence of a specific exemption, therefore, respondent's meal-allowance payments are income within the meaning of § 61 since, like the payments involved in *Glenshaw Glass Co.*, the payments are "undeniabl[y] accessions to wealth, clearly realized, and over which the [respondent has] complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra*, at 431. See also *Commissioner* v. *LoBue*, 351 U. S. 243, 247 (1956); *Van Rosen* v. *Commissioner*, 17 T. C. 834, 838 (1951).

Respondent contends, however, that § 119 can be construed to be a specific exemption covering the meal-allowance payments to New Jersey troopers. Alternatively, respondent argues that notwithstanding § 119 a specific exemption may be found in a line of lower-court cases and administrative rulings which recognize that benefits conferred by an employer on an employee "for the convenience of the employer"—at least when such benefits are not "compensatory"—are not income within the meaning of the Internal Revenue Code. In responding to these contentions, we turn first to § 119. Since we hold that § 119 does not cover cash payments of any kind, we then trace the development over several decades of the convenience-of-the-employer doctrine as a determinant

[13] The House and Senate Reports state:
"[Section 61] corresponds to section 22 (a) of the 1939 Code. While the language in existing section 22 (a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61 (a) is as broad in scope as section 22 (a)."

of the tax status of meals and lodging, turning finally to the question whether the doctrine as applied to meals and lodging survives the enactment of the Internal Revenue Code of 1954.

B

Section 119 provides that an employee may exclude from income "the value of any meals . . . furnished to him by his employer for the convenience of the emloyer, but only if . . . the meals are furnished on the business premises of the employer . . . ." By its terms, § 119 covers *meals* furnished by the employer and not *cash* reimbursements for meals. This is not a mere oversight. As we shall explain at greater length below, the form of § 119 which Congress enacted originated in the Senate and the Report accompanying the Senate bill is very clear: "Section 119 applies only to meals or lodging furnished in kind." S. Rep. No. 1622, 83d Cong., 2d Sess., 190 (1954). See also Treas. Reg. § 1.119–1 (c)(2), 26 CFR § 1.119–1 (1977). Accordingly, respondent's meal-allowance payments are not subject to exclusion under § 119.

C

The convenience-of-the-employer doctrine is not a tidy one. The phrase "convenience of the employer" first appeared in O. D. 265, 1 Cum. Bull. 71 (1919), in a ruling exempting from the income tax board and lodging furnished seamen aboard ship. The following year, T. D. 2992, 2 Cum. Bull. 76 (1920), was issued and added a convenience-of-the-employer section to Treas. Regs. 45, Art. 33, the income tax regulations then in effect.[14] As modified, Art. 33 stated:

"Art. 33. *Compensation paid other than in cash.* . . . When living quarters such as camps are furnished to

[14] Substantially identical language appeared in the income tax regulations on the date of the 1954 recodification of the Internal Revenue Code. See Treas. Regs. 111, § 29.22 (a)–3 (1943); Treas. Regs. 118, § 39.22 (a)–3 (1953).

> employees for the convenience of the employer, the ratable value need not be added to the cash compensation of the employee, but where a person receives as compensation for services rendered a salary and in addition thereto living quarters, the value to such person of the quarters furnished constitutes income subject to tax. . . ."

While T. D. 2992 extended the convenience-of-the-employer test as a general rule solely to items received in kind, O. D. 514, 2 Cum. Bull. 90 (1920), extended the convenience-of-the-employer doctrine to cash payments for "supper money." [15]

The rationale of both T. D. 2992 and O. D. 514 appears to have been that benefits conferred by an employer on an employee in the designated circumstances were not compensation for services and hence not income. Subsequent rulings equivocate on whether the noncompensatory character of a benefit could be inferred merely from its characterization by the employer or whether there must be additional evidence that employees are granted a benefit solely because the employer's business could not function properly unless an employee was furnished that benefit on the employer's premises. O. D. 514, for example, focuses only on the employer's characterization.[16] Two rulings issued in 1921, however,

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[15] " 'Supper money' paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, *such payment not being considered additional compensation and not being charged to the salary account,* is considered as being paid for the convenience of the employer . . . ." (Emphasis added.)

[16] See n. 15, *supra.* O. D. 914, 4 Cum. Bull. 85 (1921), is another ruling that makes tax consequences turn on the intention of the employer. Under O. D. 914, lodging furnished to employees of the Indian Service was determined to be income if the Department of the Interior charged such lodging to the appropriation from which compensation was normally paid; otherwise, it was not. See also O. D. 11, 1 Cum. Bull. 66 (1919) (*semble*) ("maintenance" paid to Red Cross workers includable in income only to the extent it exceeds actual living expenses).

dealing respectively with cannery workers [17] and hospital employees,[18] emphasize the necessity of the benefits to the functioning of the employer's business, and this emphasis was made the authoritative interpretation of the convenience-of-the-employer provisions of the regulations in Mim. 5023, 1940–1 Cum. Bull. 14.[19]

Adding complexity, however, is Mim. 6472, 1950–1 Cum. Bull. 15, issued in 1950. This mimeograph states in relevant part:

> "The 'convenience of the employer' rule is simply an administrative test to be applied only in cases in which the compensatory character of . . . benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered." *Ibid.*

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[17] "Where, from the location and nature of the work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and need not, therefore, be included in computing net income . . . ." O. D. 814, 4 Cum. Bull. 84, 84–85 (1921).

[18] "Where the employees of a hospital are subject to immediate service on demand at any time during the twenty-four hours of the day and on that account are required to accept quarters and meals at the hospital, the value of such quarters and meals may be considered as being furnished for the convenience of the hospital and does not represent additional compensation to the employees. On the other hand, where the employees . . . could, if they so desired, obtain meals and lodging elsewhere than in the hospital and yet perform the duties required of them by such hospital, the ratable value of the board and lodging furnished is considered additional compensation." O. D. 915, 4 Cum. Bull. 85, 85–86 (1921).

[19] "3. As a general rule, the test of 'convenience of the employer' is satisfied if living quarters or meals are furnished to an employee who is required to accept such quarters and meals in order to perform properly his duties." 1940–1 Cum. Bull., at 15, citing O. D. 915, *supra*, n. 18.

Mimeograph 6472 expressly modified all previous rulings which had suggested that meals and lodging could be excluded from income upon a simple finding that the furnishing of such benefits was necessary to allow an employee to perform his duties properly.[20] However, the ruling apparently did not affect O. D. 514, which, as noted above, creates an exclusion from income based solely on an employer's characterization of a payment as noncompensatory.

Coexisting with the regulations and administrative determinations of the Treasury, but independent of them, is a body of case law also applying the convenience-of-the-employer test to exclude from an employee's statutory income benefits conferred by his employer.

An early case is *Jones* v. *United States,* 60 Ct. Cl. 552 (1925). There the Court of Claims ruled that neither the value of quarters provided an Army officer for nine months of a tax year nor payments in commutation of quarters paid the officer for the remainder of the year were includable in income. The decision appears to rest both on a conclusion that public quarters by tradition and law were not "compensation received as such" within the meaning of § 213 of the Revenue Act of 1921, 42 Stat. 237, and also on the proposition that "public quarters for the housing of . . . officers is as much a military necessity as the procurement of implements of warfare or the training of troops." 60 Ct. Cl., at 569; see *id.,* at 565–568. The Court of Claims, in addition, rejected the argument that money paid in commutation of quarters was income on the ground that it was not "gain derived . . . from labor" within the meaning of *Eisner* v. *Macomber,* 252 U. S. 189 (1920), but apparently was at most a reimbursement to the officer for furnishing himself with a necessity of his job in those instances in which the Government found it convenient to leave the task of procuring quarters to an individual officer. 60 Ct. Cl., at 574–578.

[20] See 1950–1 Cum. Bull., at 16.

Subsequent judicial development of the convenience-of-the-employer doctrine centered primarily in the Tax Court. In two reviewed cases decided more than a decade apart, *Benaglia* v. *Commissioner*, 36 B. T. A. 838 (1937), and *Van Rosen* v. *Commissioner*, 17 T. C. 834 (1951), that court settled on the business-necessity rationale for excluding food and lodging from an employee's income.[21] *Van Rosen*'s unanimous decision is of particular interest in interpreting the legislative history of the 1954 recodification of the Internal Revenue Code since it predates that recodification by only three years. There, the Tax Court expressly rejected any reading of *Jones*, *supra*, that would make tax consequences turn on the intent of the employer, even though the employer in *Van Rosen* as in *Jones* was the United States and, also as in *Jones*, the subsistence payments involved in the litigation were provided by military regulation.[22] In addition, *Van Rosen* refused to fol-

[21] "The better and more accurate statement of the reason for the exclusion from the employee's income of the value of subsistence and quarters furnished in kind is found, we think, in *Arthur Benaglia*, 36 B. T. A. 838, where it was pointed out that, on the facts, the subsistence and quarters were not supplied by the employer and received by the employee 'for his personal convenience[,] comfort or pleasure, but solely because he could not otherwise perform the services required of him.' In other words, though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment." *Van Rosen* v. *Commissioner*, 17 T. C., at 838.

[22] Van Rosen was a civilian ship captain employed by the United States Army Transportation Corps. *Id.*, at 834. In this capacity, his pay and subsistence allowances were determined by the Marine Personnel Regulations of the Transportation Corps of the Army. *Id.*, at 837. His principal argument in the Tax Court was the factual similarity of his case to *Jones* v. *United States*, 60 Ct. Cl. 552 (1925). See 17 T. C., at 837.

low the *Jones* holding with respect to cash allowances, apparently on the theory that a civilian who receives cash allowances for expenses otherwise nondeductible has funds he can "take, appropriate, use and expend," 17 T. C., at 838, in substantially the same manner as "any other civilian employee whose employment is such as to permit him to live at home while performing the duties of his employment." *Id.*, at 836; see *id.*, at 839–840. It is not clear from the opinion whether the last conclusion is based on notions of equity among taxpayers or is simply an evidentiary conclusion that, since Van Rosen was allowed to live at home while performing his duties, there was no business purpose for the furnishing of food and lodging.

Two years later, the Tax Court in an unreviewed decision in *Doran* v. *Commissioner*, 21 T. C. 374 (1953), returned in part to the employer's-characterization rationale rejected by *Van Rosen*. In *Doran*, the taxpayer was furnished lodging in kind by a state school. State law required the value of the lodging to be included in the employee's compensation. Although the court concluded that the lodging was furnished to allow the taxpayer to be on 24-hour call, a reason normally sufficient to justify a convenience-of-the-employer exclusion,[23] it required the value of the lodging to be included in income on the basis of the characterization of the lodging as compensation under state law. The approach taken in *Doran* is the same as that in Mim. 6472, *supra*.[24] However, the Court of Appeals for the Second Circuit, in *Diamond* v. *Sturr*, 221

[23] See *Benaglia* v. *Commissioner*, 36 B. T. A. 838, 839–840 (1937); O. D. 915, *supra*, n. 18.

[24] See also *Diamond* v. *Sturr*, 116 F. Supp. 28 (NDNY 1953), rev'd, 221 F. 2d 264 (CA2 1955) (value of lodgings held taxable on same facts as *Doran*); *Romer* v. *Commissioner*, 28 T. C. 1228 (1957) (following *Doran* for tax years governed by 1939 Code); *Dietz* v. *Commissioner*, 25 T. C. 1255 (1956) (holding the value of an apartment to be includable in income under 1939 Code where the apartment was the only consideration received by the taxpayers for performing janitorial services).

F. 2d 264 (1955), on facts indistinguishable from *Doran*, reviewed the law prior to 1954 and held that the business-necessity view of the convenience-of-the-employer test, "having persisted through the interpretations of the Treasury and the Tax Court throughout years of re-enactment of the Internal Revenue Code," was the *sole* test to be applied. 221 F. 2d, at 268.

D

Even if we assume that respondent's meal-allowance payments could have been excluded from income under the 1939 Code pursuant to the doctrine we have just sketched, we must nonetheless inquire whether such an implied exclusion survives the 1954 recodification of the Internal Revenue Code. Cf. *Helvering* v. *Winmill*, 305 U. S. 79, 83 (1938). Two provisions of the 1954 Code are relevant to this inquiry: § 119 and § 120,[25] now repealed,[26] which allowed police officers to exclude from income subsistence allowances of up to $5 per day.

In enacting § 119, the Congress was determined to "end the confusion as to the tax status of meals and lodging furnished an employee by his employer." H. R. Rep. No. 1337, 83d Cong., 2d Sess., 18 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 19 (1954). However, the House and Senate initially

[25] "Sec. 120. STATUTORY SUBSISTENCE ALLOWANCE RECEIVED BY POLICE.

"(a) GENERAL RULE.—Gross income does not include any amount received as a statutory subsistence allowance by an individual who is employed as a police official . . . .

"(b) LIMITATIONS.—

"(1) Amounts to which subsection (a) applies shall not exceed $5 per day.

"(2) If any individual receives a subsistence allowance to which subsection (a) applies, no deduction shall be allowed under any other provision of this chapter for expenses in respect of which he has received such allowance, except to the extent that such expenses exceed the amount excludable under subsection (a) and the excess is otherwise allowable as a deduction under this chapter." 68A Stat. 39.

[26] See Technical Amendments Act of 1958, § 3, 72 Stat. 1607.

differed on the significance that should be given the convenience-of-the-employer doctrine for the purposes of § 119. As explained in its Report, the House proposed to exclude meals from gross income "if they [were] furnished at the place of employment and the employee [was] required to accept them at the place of employment as a condition of his employment." H. R. Rep. No. 1337, *supra,* at 18; see H. R. 8300, 83d Cong., 2d Sess., § 119 (1954). Since no reference whatsoever was made to the concept, the House view apparently was that a statute "designed to end the confusion as to the tax status of meals and lodging furnished an employee by his employer" required complete disregard of the convenience-of-the-employer doctrine.

The Senate, however, was of the view that the doctrine had at least a limited role to play. After noting the existence of the doctrine and the Tax Court's reliance on state law to refuse to apply it in *Doran* v. *Commissioner, supra,* the Senate Report states:

> "Your committee believes that the House provision is ambiguous in providing that meals or lodging furnished on the employer's premises, which the employee is required to accept as a condition of his employment, are excludable from income whether or not furnished as compensation. Your committee has provided that the basic test of exclusion is to be whether the meals or lodging are furnished primarily for the convenience of the employer (and thus excludable) or whether they were primarily for the convenience of the employee (and therefore taxable). However, in deciding whether they were furnished for the convenience of the employer, the fact that a State statute or an employment contract fixing the terms of the employment indicate the meals or lodging are intended as compensation is not to be determinative. This means that employees of State institutions who are required to live and eat on the premises will not be taxed

> on the value of the meals and lodging even though the State statute indicates the meals and lodging are part of the employee's compensation." S. Rep. No. 1622, *supra*, at 19.

In a technical appendix, the Senate Report further elaborated:

> "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation." *Id.*, at 190–191.

After conference, the House acquiesced in the Senate's version of § 119. Because of this, respondent urges that § 119 as passed did not discard the convenience-of-the-employer doctrine, but indeed endorsed the doctrine shorn of the confusion created by Mim. 6472 and cases like *Doran*. Respondent further argues that, by negative implication, the technical appendix to the Senate Report creates a class of noncompensatory cash meal payments that are to be excluded from income. We disagree.

The Senate unquestionably intended to overrule *Doran* and rulings like Mim. 6472. Equally clearly the Senate refused completely to abandon the convenience-of-the-employer doctrine as the House wished to do. On the other hand, the Senate did not propose to leave undisturbed the convenience-of-the-employer doctrine as it had evolved prior to the promulgation of Mim. 6472. The language of § 119 [27] quite plainly rejects the reasoning behind rulings like O. D. 514, see n. 15, *supra*, which rest on the employer's characterization of the nature of a payment.[28] This conclusion is but-

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[27] "[T]he provisions of an employment contract . . . shall not be determinative of whether . . . meals . . . are intended as compensation."

[28] We do not decide today whether, notwithstanding § 119, the "supper money" exclusion may be justified on other grounds. See, *e. g.*, Treasury Department, Proposed Fringe Benefit Regulations, 40 Fed. Reg. 41118,

tressed by the Senate's choice of a term of art, "convenience of the employer," in describing one of the conditions for exclusion under § 119. In so choosing, the Senate obviously intended to adopt the meaning of that term as it had developed over time, except, of course, to the extent § 119 overrules decisions like *Doran*. As we have noted above, *Van Rosen* v. *Commissioner*, 17 T. C. 834 (1951), provided the controlling court definition at the time of the 1954 recodification and it expressly rejected the *Jones* theory of "convenience of the employer"—and by implication the theory of O. D. 514—and adopted as the exclusive rationale the business-necessity theory. See 17 T. C., at 838–840. The business-necessity theory was also the controlling administrative interpretation of "convenience of the employer" prior to Mim. 6472. See *supra*, at 85–86, and n. 19. Finally, although the Senate Report did not expressly define "convenience of the employer" it did describe those situations in which it wished to reverse the courts and create an exclusion as those where "an employee must accept . . . meals or lodging in order properly to perform his duties." S. Rep. No. 1622, *supra*, at 190.

As the last step in its restructuring of prior law, the Senate adopted an additional restriction created by the House and not theretofore a part of the law, which required that meals subject to exclusion had to be taken on the business premises of the employer. Thus § 119 comprehensively modified the prior law, both expanding and contracting the exclusion for meals and lodging previously provided, and it must therefore be construed as its draftsmen obviously intended it to be—as a replacement for the prior law, designed to "end [its] confusion."

Because § 119 replaces prior law, respondent's further argument—that the technical appendix in the Senate Report

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41121 (1975) (example 8). Nor do we decide whether sporadic meal reimbursements may be excluded from income. Cf. *United States* v. *Correll*, 389 U. S. 299 (1967).

recognized the existence under § 61 of an exclusion for a class of noncompensatory cash payments—is without merit. If cash meal allowances could be excluded on the mere showing that such payments served the convenience of the employer, as respondent suggests, then cash would be more widely excluded from income than meals in kind, an extraordinary result given the presumptively compensatory nature of cash payments and the obvious intent of § 119 to narrow the circumstances in which meals could be excluded. Moreover, there is no reason to suppose that Congress would have wanted to recognize a class of excludable cash meal payments. The two precedents for the exclusion of cash—O. D. 514 and *Jones* v. *United States*—both rest on the proposition that the convenience of the employer can be inferred from the characterization given the cash payments by the employer, and the heart of this proposition is undercut by both the language of § 119 and the Senate Report. *Jones* also rests on *Eisner* v. *Macomber*, 252 U. S. 189 (1920), but Congress had no reason to read *Eisner*'s definition of income into § 61 and, indeed, any assumption that Congress did is squarely at odds with *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955).[29] See *id.*, at 430–431. Finally, as petitioner suggests, it is much more reasonable to assume that the cryptic statement in the technical appendix—"cash allowances . . . will continue to be includable in gross income to the extent that such allowances constitute compensation"—was meant to in-

[29] Moreover, it must be recognized that § 213 of the Revenue Act of 1921, 42 Stat. 237, which was involved in *Jones* v. *United States*, made a distinction by its terms between "gross income" which included "salaries, wages, or compensation for personal service" and the "compensation received as such" by an officer of the United States. See 60 Ct. Cl., at 563. The Court of Claims assumed that Congress by so distinguishing intended to tax United States officers more narrowly than other taxpayers by levying the income tax only on amounts expressly characterized by Congress as compensation. See *ibid.* For this reason, *Jones* is of limited value in construing § 61 which contains no language even remotely similar to § 213.

dicate only that meal payments otherwise deductible under § 162 (a)(2) of the 1954 Code [30] were not affected by § 119.

Moreover, even if we were to assume with respondent that cash meal payments made for the convenience of the employer could qualify for an exclusion notwithstanding the express limitations upon the doctrine embodied in § 119, there would still be no reason to allow the meal allowance here to be excluded. Under the pre-1954 convenience-of-the-employer doctrine respondent's allowance is indistinguishable from that in *Van Rosen* v. *Commissioner, supra,* and hence it is income. Indeed, the form of the meal allowance involved here has drastically changed from that passed on in *Saunders* v. *Commissioner,* 215 F. 2d 768 (CA3 1954), relied on by the Third Circuit below, see *supra,* at 82, and in its present form the allowance is not excludable even under *Saunders'* analysis.[31] In any case, to avoid the completely unwarranted result of creating a larger exclusion for cash than kind, the meal allowances here would have to be demonstrated to be necessary to allow respondent "properly to perform his duties." There is not even a suggestion on this record of any such necessity.

Finally, respondent argues that it is unfair that members of the military may exclude their subsistence allowances from income while respondent cannot. While this may be so, arguments of equity have little force in construing the boundaries

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[30] "§ 162. Trade or business expenses.

"(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

"(1) . . . ;

"(2) Traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade of business . . . ."

[31] Compare *supra,* at 80–81 and *Magness* v. *Commissioner,* 247 F. 2d 740 (CA5 1957), with *Saunders* v. *Commissioner.*

of exclusions and deductions from income many of which, to be administrable, must be arbitrary. In any case, Congress has already considered respondent's equity argument and has rejected it in the repeal of § 120 of the 1954 Code. That provision as enacted allowed state troopers like respondent to exclude from income up to $5 of subsistence allowance per day. Section 120 was repealed after only four years, however, because it was "inequitable since there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Thus, it appears that certain police officials by reason of this exclusion are placed in a more favorable position taxwise than other individual income taxpayers who incur the same types of expense. . . ." H. R. Rep. No. 775, 85th Cong., 1st Sess., 7 (1957).

Reversed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

More than a decade ago the United States Court of Appeals for the Eighth Circuit, in *United States* v. *Morelan*, 356 F. 2d 199 (1966), held that the $3-per-day subsistence allowance paid Minnesota state highway patrolmen was excludable from gross income under § 119 of the Internal Revenue Code of 1954, 26 U. S. C. § 119. It held, alternatively, that if the allowance were includable in gross income, it was deductible as an ordinary and necessary meal-cost trade or business expense under § 162 (a)(2) of the Code, 26 U. S. C. § 162 (a)(2). I sat as a Circuit Judge on that case. I was happy to join Chief Judge Vogel's opinion because I then felt, and still do, that it was correct on both grounds. Certainly, despite the usual persistent Government opposition in as many Courts of Appeals as were available, the ruling was in line with other authority at the appellate level at that time.*

**Saunders* v. *Commissioner*, 215 F. 2d 768 (CA3 1954); *United States* v. *Barrett*, 321 F. 2d 911 (CA5 1963); *Hanson* v. *Commissioner*, 298 F. 2d

Two cases, *Magness* v. *Commissioner*, 247 F. 2d 740 (CA5 1957), cert. denied, 355 U. S. 931 (1958), and *Hyslope* v. *Commissioner*, 21 T. C. 131 (1953), were distinguished. 356 F. 2d, at 207.

On December 11, 1967, however, this Court by a 5–3 vote decided *United States* v. *Correll*, 389 U. S. 299, restricting to overnight trips the travel-expense deduction for meal costs under § 162 (a)(2). That decision, of course, disapproved *Morelan*'s alternative ground for decision. I am frank to say that had I been a Member of this Court at the time *Correll* was decided, I would have joined its dissent, 389 U. S., at 307, for I fully agree with Mr. Justice Douglas' observation there, joined by Justices Black and Fortas—an observation which, for me, is unanswerable and unanswered—that the Court, with a bow to the Government's argument for administrative convenience, and conceding an element of arbitrariness, *id.*, at 303, read the word "overnight" into § 162 (a)(2), a statute that speaks only in geographical terms.

The taxpayer in the present case, faced with *Correll*, understandably does not press the § 162 (a)(2) issue, but confines his defense to §§ 61 and 119.

I have no particular quarrel with the conclusion that the payments received by the New Jersey troopers constituted income to them under § 61. I can accept that, but my stance in *Morelan* leads me to disagree with the Court's conclusion that the payments are not excludable under § 119. The Court draws an in-cash or in-kind distinction. This has no appeal or persuasion for me because the statute does not speak specifically in such terms. It does no more than refer to "meals . . . furnished on the business premises of the employer," and from those words the Court draws the in-kind consequence. I am not so sure. In any event, for me, as was the case in *Morelan*, the business premises of the State of

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391 (CA8 1962). As in *Morelan*, certiorari apparently was not sought in any of this line of cases up to that time.

New Jersey, the trooper's employer, are wherever the trooper is on duty in that State. The employer's premises are statewide.

The Court in its opinion makes only passing comment, with a general reference to fairness, on the ironical difference in tax treatment it now accords to the paramilitary New Jersey state trooper structure and the federal military. The distinction must be embarrassing to the Government in its position here, for the Internal Revenue Code draws no such distinction. The Commissioner is forced to find support for it—support which the Court in its opinion in this case does not stretch to find—only from a regulation, Treas. Reg. § 1.61–2 (b), 26 CFR § 1.61–2 (b) (1977), excluding subsistence allowances granted the military, and the general references in 37 U. S. C. § 101 (25) (1970 ed., Supp. V), added by Pub. L. 93–419, § 1, 88 Stat. 1152, to "regular military compensation" and "Federal tax advantage accruing to the aforementioned allowances because they are not subject to Federal income tax." This, for me, is thin and weak support for recognizing a substantial benefit for the military and denying it for the New Jersey state trooper counterpart.

I fear that state troopers the country over, not handsomely paid to begin with, will never understand today's decision. And I doubt that their reading of the Court's opinion—if, indeed, a layman can be expected to understand its technical wording—will convince them that the situation is as clear as the Court purports to find it.

SHELL OIL CO. *v.* DARTT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 76-678. Argued November 7, 1977—Decided November 29, 1977

539 F. 2d 1256, affirmed by an equally divided Court.

Mary T. Matthies argued the cause for petitioner. With her on the briefs was *Brynn F. Aurelius.*

Jefferson G. Greer argued the cause and filed a brief for respondent.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

**Jay S. Siegel, Frank C. Morris, Jr., Robert E. Williams,* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

IDAHO DEPARTMENT OF EMPLOYMENT *v.* SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 76–1291. Decided December 5, 1977

Idaho statute providing that "no person shall be deemed to be unemployed while attending a regular established school excluding night school" *held* not to violate the Equal Protection Clause of the Fourteenth Amendment by denying unemployment benefits to otherwise eligible persons who attend school during the day. It was rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school in the daytime imposes a greater restriction upon obtaining full-time employment than does attending night school. Moreover, the classification, although imperfect, serves as a predictable and convenient means for distinguishing between those who are likely to be students primarily and part-time workers only secondarily and those who are primarily full-time workers and students only secondarily.

Certiorari granted; 98 Idaho 43, 557 P. 2d 637, reversed.

PER CURIAM.

Petitioner challenges a ruling of the Idaho Supreme Court that the denial of unemployment benefits to otherwise eligible persons who attend school during the day violates the Equal Protection Clause of the Fourteenth Amendment. Idaho Code § 72–1312 (a) (1973) states that "no person shall be deemed to be unemployed while he is attending a regular established school excluding night school . . . ." The Idaho Supreme Court held that this provision impermissibly discriminates between those unemployed persons who attend night school and those who attend school during the day and that petitioner could not constitutionally deny unemployment benefits to an otherwise eligible person such as respondent whose attendance at daytime classes would not interfere with employment in her usual occupation and did not affect her availability for full-

time work. We grant the petition for certiorari and reverse the judgment of the Idaho Supreme Court.

The holding below misconstrues the requirements of the Equal Protection Clause in the field of social welfare and economics. This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911). See also *Massachusetts Board of Retirement* v. *Murgia,* 427 U. S. 307 (1976); *Mathews* v. *De Castro,* 429 U. S. 181 (1976); *Jefferson* v. *Hackney,* 406 U. S. 535 (1972). The legislative classification at issue here passes this test. It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining full-time employment than does attending school at night. In a world of limited resources, a State may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school. Moreover, the classification serves as a predictable and convenient means for distinguishing between those who are likely to be students primarily and part-time workers only secondarily and thus ineligible for unemployment compensation and those who are primarily full-time workers and students only secondarily without the necessity of making costly individual eligibility determinations which would deplete available resources. The fact that the classification is imperfect and that the availability of some students desiring full-time

employment may not be substantially impaired by their attendance at daytime classes does not, under the cases cited *supra*, render the statute invalid under the United States Constitution.

Reversed.

MR. JUSTICE BLACKMUN, concurring.

Petitioner Department ruled that respondent became ineligible for state employment insurance benefits when she "enrolled in summer school" (Pet. for Cert. 3) and attended classes from 7 a. m. to 9 a. m., Monday through Friday. These early morning hours of instruction obviously preceded the working day of a retail clerk, respondent's occupation. I would have thought, in light of the fact those school hours did not impinge upon the working day, that the Supreme Court of Idaho might have regarded this as attendance at "night school," within the meaning of Idaho Code § 72–1312 (a) (1973). That court, however, chose not to do so and, instead, rested its decision upon difficult and precarious federal equal protection analysis. Correct equal protection analysis, it seems to me, necessarily redounds to petitioner's, rather than respondent's, benefit, and I therefore am compelled, albeit somewhat reluctantly (because the respondent, who was without counsel in the state proceedings, will never understand why the law is against her in this respect), to join the Court's opinion summarily reversing the judgment of the Idaho court.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting in part.

I agree with my Brother STEVENS that there is no basis for granting certiorari in this case. I add only that, for me, the record presents serious problems of mootness that have been addressed by neither party's counsel and, in addition, I question whether the federal issue argued by the State here was properly presented below. In light of these additional problems, our summary reversal may indeed "create the unfortunate

impression that the Court is more interested in upholding the power of the State than in vindicating individual rights." *Post,* at 105.

Nonetheless, if the federal issue is properly before us, I must agree that the Supreme Court of Idaho committed error. See *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471 (1977). This does not mean, of course, that respondent must lose her unemployment benefits. As my Brother BLACKMUN notes, the Supreme Court of Idaho on remand may well want to consider whether the purpose of the Idaho Legislature in passing the "night school" provision of Idaho Code § 72–1312 (a) (1973) would not be better served by construing that phrase to include early morning classes, which like night classes are apparently intended by their provider, Boise State University, to allow persons both to work (or seek work) and to go to school. If this construction is not adopted, the court may want to consider whether the Idaho Constitution invalidates § 72–1312 (a). See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

MR. JUSTICE STEVENS, dissenting in part.

In defining the jurisdiction of this Court to review the final judgments rendered by the highest court of a State, Congress has sharply differentiated between cases in which the state court has rejected a federal claim and those in which the federal claim has been vindicated. In the former category our jurisdiction is mandatory; in the latter, it is discretionary.[1]

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[1] Title 28 U. S. C. § 1257 provides:

"§ 1257. State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of

Our jurisdiction in this case is in the discretionary category. The Idaho Supreme Court has ordered the Idaho Department of Employment to pay benefits to an Idaho resident, resting its decision on an interpretation of the Fourteenth Amendment. Since this decision does not create a conflict and does not involve a question of national importance, it is inappropriate to grant certiorari and order full briefing and oral argument.

Even though there was error in the Idaho Supreme Court's use of the Fourteenth Amendment as a basis for providing an Idaho resident with more protection than the Federal Constitution requires, I do not believe that error is a sufficient justification for the exercise of this Court's discretionary jurisdiction. We are much too busy to correct every error that is called to our attention in the thousands of certiorari petitions that are filed each year. Whenever we attempt to do so summarily, we court the danger of either committing error ourselves or of confusing rather than clarifying the law.[2] This risk is aggravated when the losing litigant is too poor to hire a lawyer, as is true in this case.[3] Moreover, this Court's

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any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

[2] Cf. *Hammer* v. *Oregon State Penitentiary*, 276 Ore. 651, 556 P. 2d 1348 (1976), summarily vacated and remanded, *post*, p. 945. (STEVENS, J., dissenting).

[3] Respondent originally submitted a *pro se* letter in opposition to the petition for certiorari. Through the efforts of petitioner itself, a brief was eventually submitted on her behalf by a professor at the Idaho College of Law.

random and spasmodic efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights.

For these reasons, although I have no quarrel with the majority's analysis of the merits, I think it would have been wise for the Court to deny certiorari in this case.

PENNSYLVANIA *v.* MIMMS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 76–1830. Decided December 5, 1977

After police officers had stopped respondent's automobile for being operated with an expired license plate, one of the officers asked respondent to step out of the car and produce his license and registration. As respondent alighted, a large bulge under his jacket was noticed by the officer, who thereupon frisked him and found a loaded revolver. Respondent was then arrested and subsequently indicted for carrying a concealed weapon and unlicensed firearm. His motion to suppress the revolver was denied and after a trial, at which the revolver was introduced in evidence, he was convicted. The Pennsylvania Supreme Court reversed on the ground that the revolver was seized in violation of the Fourth Amendment. *Held:*

1. The order to get out of the car, issued after the respondent was lawfully detained, was reasonable and thus permissible under the Fourth Amendment. The State's proffered justification for such order—the officer's safety—is both legitimate and weighty, and the intrusion into respondent's personal liberty occasioned by the order, being at most a mere inconvenience, cannot prevail when balanced against legitimate concerns for the officer's safety.

2. Under the standard announced in *Terry* v. *Ohio*, 392 U. S. 1, 21–22—whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate"—the officer was justified in making the search he did once the bulge in respondent's jacket was observed.

Certiorari granted; 471 Pa. 546, 370 A. 2d 1157, reversed and remanded.

PER CURIAM.

Petitioner Commonwealth seeks review of a judgment of the Supreme Court of Pennsylvania reversing respondent's conviction for carrying a concealed deadly weapon and a firearm without a license. That court reversed the conviction because it held that respondent's "revolver was seized in a

manner which violated the Fourth Amendment to the Constitution of the United States." 471 Pa. 546, 548, 370 A. 2d 1157, 1158 (1977). Because we disagree with this conclusion, we grant the Commonwealth's petition for certiorari and reverse the judgment of the Supreme Court of Pennsylvania.

The facts are not in dispute. While on routine patrol, two Philadelphia police officers observed respondent Harry Mimms driving an automobile with an expired license plate. The officers stopped the vehicle for the purpose of issuing a traffic summons. One of the officers approached and asked respondent to step out of the car and produce his owner's card and operator's license. Respondent alighted, whereupon the officer noticed a large bulge under respondent's sports jacket. Fearing that the bulge might be a weapon, the officer frisked respondent and discovered in his waistband a .38-caliber revolver loaded with five rounds of ammunition. The other occupant of the car was carrying a .32-caliber revolver. Respondent was immediately arrested and subsequently indicted for carrying a concealed deadly weapon and for unlawfully carrying a firearm without a license. His motion to suppress the revolver was denied; and, after a trial at which the revolver was introduced into evidence, respondent was convicted on both counts.

As previously indicated, the Supreme Court of Pennsylvania reversed respondent's conviction, however, holding that the revolver should have been suppressed because it was seized contrary to the guarantees contained in the Fourth and Fourteenth Amendments to the United States Constitution.[1] The Pennsylvania court did not doubt that the officers acted reasonably in stopping the car. It was also willing to assume, *arguendo,* that the limited search for weapons was proper once the officer observed the bulge under respondent's coat. But the court nonetheless thought the search constitutionally in-

[1] Three judges dissented on the federal constitutional issue.

firm because the officer's order to respondent to get out of the car was an impermissible "seizure." This was so because the officer could not point to "objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety." [2] Since this unconstitutional intrusion led directly to observance of the bulge and to the subsequent "pat down," the revolver was the fruit of an unconstitutional search, and, in the view of the Supreme Court of Pennsylvania, should have been suppressed.

We do not agree with this conclusion.[3] The touchstone of

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[2] 471 Pa., at 552, 370 A. 2d, at 1160.

[3] We note that in his brief in opposition to a grant of certiorari respondent contends that this case is moot because he has already completed the 3-year maximum of the 1½- to 3-year sentence imposed. The case has, he argues, terminated against him for all purposes and for all time regardless of this Court's disposition of the matter. See *St. Pierre* v. *United States*, 319 U. S. 41 (1943).

But cases such as *Sibron* v. *New York*, 392 U. S. 40, 53–57 (1968); *Street* v. *New York*, 394 U. S. 576 (1969); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); and *Ginsberg* v. *New York*, 390 U. S. 629 (1968), bear witness to the fact that this Court has long since departed from the rule announced in *St. Pierre*, *supra*. These more recent cases have held that the possibility of a criminal defendant's suffering "collateral legal consequences" from a sentence already served permits him to have his claims reviewed here on the merits. If the prospect of the State's visiting such collateral consequences on a criminal defendant who has served his sentence is a sufficient burden as to enable him to seek reversal of a decision affirming his conviction, the prospect of the State's inability to impose such a burden following a reversal of the conviction of a criminal defendant in its own courts must likewise be sufficient to enable the State to obtain review of its claims on the merits here. In any future state criminal proceedings against respondent, this conviction may be relevant to setting bail and length of sentence, and to the availability of probation. 18 Pa. Cons. Stat. Ann. §§ 1321, 1322, 1331, 1332 (Purdon Supp. 1977); Pa. Rule Crim. Proc. 4004. In view of the fact that respondent, having fully served his state sentence, is presently incarcerated in the federal penitentiary at Lewisburg, Pa., we cannot say that such considerations are unduly specula-

our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry* v. *Ohio*, 392 U. S. 1, 19 (1968). Reasonableness, of course, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975).

In this case, unlike *Terry* v. *Ohio*, there is no question about the propriety of the initial restrictions on respondent's freedom of movement. Respondent was driving an automobile with expired license tags in violation of the Pennsylvania Motor Vehicle Code.[4] Deferring for a moment the legality of the "frisk" once the bulge had been observed, we need presently deal only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment. This inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle or from the later "pat down," but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.

Placing the question in this narrowed frame, we look first to that side of the balance which bears the officer's interest in taking the action that he did. The State freely concedes the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior. It was apparently

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tive even if a determination of mootness depended on a case-by-case analysis.

[4] Operating an improperly licensed motor vehicle was at the time of the incident covered by 1959 Pa. Laws, No. 32, which was found in Pa. Stat. Ann., Tit. 75, § 511 (a) (Purdon 1971), and has been repealed by 1976 Pa. Laws, No. 81, § 7, effective July 1, 1977. This offense now appears to be covered by 75 Pa. Cons. Stat. Ann. §§ 1301, 1302 (Purdon 1977).

his practice to order all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation. The State argues that this practice was adopted as a precautionary measure to afford a degree of protection to the officer and that it may be justified on that ground. Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.[5]

We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry* v. *Ohio, supra,* at 23. And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. "According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963)." *Adams* v. *Williams,* 407 U. S. 143, 148 n. 3 (1972). We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. *United States* v. *Robinson,* 414 U. S. 218, 234 (1973). Indeed, it appears "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." *Id.,* at 234 n. 5.

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[5] The State does not, and need not, go so far as to suggest that an officer may frisk the occupants of any car stopped for a traffic violation. Rather, it only argues that it is permissible to order the driver out of the car. In this particular case, argues the State, once the driver alighted, the officer had independent reason to suspect criminal activity and present danger and it was upon this basis, and not the mere fact that respondent had committed a traffic violation, that he conducted the search.

The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.

Against this important interest we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'" *Terry* v. *Ohio, supra,* at 17 What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.[6]

There remains the second question of the propriety of the search once the bulge in the jacket was observed. We have as little doubt on this point as on the first; the answer is controlled by *Terry* v. *Ohio, supra.* In that case we thought the officer justified in conducting a limited search for weapons

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[6] Contrary to the suggestion in the dissent of our Brother STEVENS, *post,* at 122, we do not hold today that "whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

once he had reasonably concluded that the person whom he had legitimately stopped might be armed and presently dangerous. Under the standard enunciated in that case—whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate" [7]—there is little question the officer was justified. The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of "reasonable caution" would likely have conducted the "pat down."

Respondent's motion to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, the judgment of the Supreme Court of Pennsylvania is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, dissenting.

I join my Brother STEVENS' dissenting opinion, but I write separately to emphasize the extent to which the Court today departs from the teachings of *Terry* v. *Ohio*, 392 U. S. 1 (1968).

In *Terry* the policeman who detained and "frisked" the petitioner had for 30 years been patrolling the area in downtown Cleveland where the incident occurred. His experience led him to watch petitioner and a companion carefully, for a long period of time, as they individually and repeatedly looked into a store window and then conferred together. Suspecting that the two men might be "casing" the store for a "stick-up" and that they might have guns, the officer followed them as they walked away and joined a third man with whom they had earlier conferred. At this point the officer approached the men and asked for their names. When they "mumbled something" in response, the officer grabbed petitioner, spun

[7] 392 U. S., at 21–22.

him around to face the other two, and "patted down" his clothing. This frisk led to discovery of a pistol and to petitioner's subsequent weapons conviction. *Id.*, at 5–7.

The "stop and frisk" in *Terry* was thus justified by the probability, not only that a crime was about to be committed, but also that the crime "would be likely to involve the use of weapons." *Id.*, at 28. The Court confined its holding to situations in which the officer believes that "the persons with whom he is dealing may be armed and presently dangerous" and "fear[s] for his own or others' safety." *Id.*, at 30. Such a situation was held to be present in *Adams* v. *Williams*, 407 U. S. 143 (1972), which involved a person who "was reported to be carrying . . . a concealed weapon." *Id.*, at 147; see *id.*, at 146, 148.

In the instant case, the officer did not have even the slightest hint, prior to ordering respondent out of the car, that respondent might have a gun. As the Court notes, *ante*, at 109, "the officer had no reason to suspect foul play." The car was stopped for the most routine of police procedures, the issuance of a summons for an expired license plate. Yet the Court holds that, once the officer had made this routine stop, he was justified in imposing the additional intrusion of ordering respondent out of the car, regardless of whether there was any individualized reason to fear respondent.

Such a result cannot be explained by *Terry*, which limited the nature of the intrusion by reference to the reason for the stop. The Court held that "the officer's action [must be] reasonably related in scope to the circumstances which justified the interference in the first place." 392 U. S., at 20.[1] In *Terry* there was an obvious connection, emphasized by the Court, *id.*, at 28–30, between the officer's suspicion that an armed robbery was being planned and his frisk for weapons.

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[1] See also 392 U. S., at 19 ("[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible"); *id.*, at 29–30.

In the instant case "the circumstance . . . which justified the interference in the first place" was an expired license plate. There is simply no relation at all between that circumstance and the order to step out of the car.

The institutional aspects of the Court's decision trouble me as much as does the Court's substantive result. The Court extends *Terry*'s expressly narrow holding, see *id.*, at 30, solely on the basis of certiorari papers, and in the process summarily reverses the considered judgment of Pennsylvania's highest court. Such a disposition cannot engender respect for the work of this Court.[2] That we are deciding such an important issue by "reach[ing] out" in a case that "barely escapes mootness," as noted by MR. JUSTICE STEVENS, *post*, at 117, 116 n. 4, and that may well be resolved against the State on remand in any event,[3] simply reinforces my view that the Court does

[2] Professor Ernest Brown wrote nearly 20 years ago:

"[S]ummary reversal on certiorari papers appears in many cases to raise serious question whether there has not been decision without that hearing usually thought due from judicial tribunals. . . . [T]here [is] the question whether the Court does not pay a disproportionate price in public regard when it defeats counsel's reasonable expectation of a hearing, based upon the Court's own rules. If the Court exercises its certiorari jurisdiction to deal with problems of national legal significance, it hardly needs demonstration that such matters warrant hearing on the merits." The Supreme Court 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 80, 82 (1958).

See also R. Stern & E. Gressman, Supreme Court Practice § 5.12 (4th ed. 1969). MR. JUSTICE BRENNAN has singled out cases from the state courts as ones where we should be particularly reluctant to reverse summarily. State Court Decisions and the Supreme Court, 31 Pa. Bar Assn. Q. 393, 403 (1960).

[3] On remand the Pennsylvania Supreme Court will have open to it the option of reaching the same result that it originally reached, but doing so under its state counterpart of the Fourth Amendment, Pa. Const., Art. 1, § 8, rather than under the Federal Constitution. A disposition on such an independent and adequate state ground is not, and could not be, in any way foreclosed by this Court's decision today, nor could this Court review a decision of this nature. See generally Brennan, State Constitutions and

institutional as well as doctrinal damage by the course it pursues today. I dissent.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Almost 10 years ago in *Terry* v. *Ohio*, 392 U. S. 1, the Court held that "probable cause" was not required to justify every seizure of the person by a police officer. That case was decided after six months of deliberation following full argument and unusually elaborate briefing.[1] The approval in *Terry* of a lesser standard for certain limited situations represented a major development in Fourth Amendment jurisprudence.

Today, without argument, the Court adopts still another—

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the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); Project Report: Toward an Activist Role for State Bills of Rights, 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 271 (1973).

In addition, respondent's conviction may be reversed on a ground entirely unrelated to the search at issue here. At trial the prosecutor questioned a defense witness about respondent's religious affiliation, a matter not raised on direct examination of the witness. Two concurring justices of the Pennsylvania Supreme Court contended that this questioning provided an independent reason for reversing respondent's conviction under Pennsylvania law. 471 Pa. 546, 556–557, 370 A. 2d 1157, 1162–1163 (1977) (Nix, J., joined by O'Brien, J., concurring).

[1] Briefs of *amici curiae*, urging reversal, were filed by Jack Greenberg, James M. Nabrit III, Michael Meltsner, Melvyn Zarr, and Anthony G. Amsterdam for the NAACP Legal Defense and Educational Fund, Inc., and by Bernard A. Berkman, Melvin L. Wulf, and Alan H. Levine for the American Civil Liberties Union et al.

Briefs of *amici curiae*, urging affirmance, were filed by Solicitor General Griswold, Assistant Attorney General Vinson, Ralph S. Spritzer, Beatrice Rosenberg, and Mervyn Hamburg for the United States; by Louis J. Lefkowitz, *pro se*, Samuel A. Hirshowitz, First Assistant Attorney General, and Maria L. Marcus and Brenda Soloff, Assistant Attorneys General, for the Attorney General of New York; by Charles Moylan, Jr., Evelle J. Younger, and Harry Wood for the National District Attorneys' Assn.; and by James R. Thompson for Americans for Effective Law Enforcement. See 392 U. S., at 4.

and even lesser—standard of justification for a major category of police seizures.[2] More importantly, it appears to abandon "the central teaching of this Court's Fourth Amendment jurisprudence" [3]—which has ordinarily required individualized inquiry into the particular facts justifying every police intrusion—in favor of a general rule covering countless situations. But what is most disturbing is the fact that this important innovation is announced almost casually, in the course of explaining the summary reversal of a decision the Court should not even bother to review.

Since Mimms has already served his sentence, the importance of reinstating his conviction is minimal at best.[4] Even if the Pennsylvania Supreme Court has afforded him greater protection than is required by the Federal Constitution, the conviction may be invalid under state law.[5] Moreover, the

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[2] The Court does not dispute, nor do I, that ordering Mimms out of his car was a seizure. A seizure occurs whenever an "officer, by means of physical force or show of authority, . . . in some way restrain[s] the liberty of a citizen . . . ." *Id.*, at 19 n. 16. See also *Adams* v. *Williams*, 407 U. S. 143, 146.

[3] In *Terry*, the Court made it clear that the reasonableness of a search is to be determined by an inquiry into the facts of each case:

"[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U. S., at 21.

In a footnote, the Court continued:

"This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.*, at 21 n. 18 (citing a long list of authorities).

[4] For the reasons stated in n. 3 of the Court's opinion, I agree that the case is not moot. Nevertheless, the fact that the case barely escapes mootness supports the conclusion that certiorari should be denied.

[5] Two members of the court were persuaded that introducing testimony about Mimms' Muslim religious beliefs was prejudicial error, and three others specifically reserved the issue. 471 Pa. 546, 555 n. 2, and 556–557, 370 A. 2d 1157, 1158 n. 2, and 1162–1163.

Pennsylvania Supreme Court may still construe its own constitution to prohibit what it described as the "indiscriminate procedure" of ordering all traffic offenders out of their vehicles. 471 Pa. 546, 553, 370 A. 2d 1157, 1161.[6] In all events, whatever error the state court has committed affects only the Commonwealth of Pennsylvania. Its decision creates no conflict requiring resolution by this Court on a national level. In most cases, these considerations would cause us to deny certiorari.

No doubt it is a legitimate concern about the safety of police officers throughout the Nation that prompts the Court to give this case such expeditious treatment. I share that concern and am acutely aware that almost every decision of this Court holding that an individual's Fourth Amendment rights have been invaded makes law enforcement somewhat more difficult and hazardous. That, however, is not a sufficient reason for this Court to reach out to decide every new Fourth Amendment issue as promptly as possible. In this area of constitutional adjudication, as in all others, it is of paramount importance that the Court have the benefit of differing judicial evaluations of an issue before it is finally resolved on a nationwide basis.

This case illustrates two ways in which haste can introduce a new element of confusion into an already complex set of rules. First, the Court has based its legal ruling on a factual assumption about police safety that is dubious at best; second, the Court has created an entirely new legal standard of justification for intrusions on the liberty of the citizen.

Without any attempt to differentiate among the multitude of varying situations in which an officer may approach a person

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[6] Cf. *State* v. *Opperman*, 89 S. D. 25, 228 N. W. 2d 152 (1975), rev'd, 428 U. S. 364, judgment reinstated under state constitution, — S. D. —, 247 N. W. 2d 673 (1976).

seated in an automobile, the Court characterizes the officer's risk as "inordinate" on the basis of this statement:

> "'According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963).' *Adams* v. *Williams,* 407 U. S. 143, 148 n. 3 (1972)." *Ante,* at 110.

That statement does not fairly characterize the study to which it refers. Moreover, the study does not indicate that police officers can minimize the risk of being shot by ordering drivers stopped for routine traffic violations out of their cars. The study reviewed 110 selected police shootings that occurred in 1959, 1960, and 1961.[7] In 35 of those cases, "officers were attempting to investigate, control, or pursue suspects who were in automobiles."[8] Within the group of 35 cases, there were examples of officers who "were shot through the windshield or car body while their vehicle was moving"; examples in which "the officer was shot while dismounting from his vehicle or while approaching the suspect[']s vehicle"; and, apparently, instances in which the officer was shot by a passenger in the vehicle. Bristow, *supra,* n. 7, at 93.

In only 28 of the 35 cases was the location of the suspect who shot the officer verified. In 12 of those cases the suspect was seated behind the wheel of the car, but that figure seems to include cases in which the shooting occurred before the officer had an opportunity to order the suspect to get out. In

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[7] As the author pointed out, "[n]o attempt was made to obtain a random selection of these cases, as they were extremely hard to collect." Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963).

[8] *Ibid.* Since 35 is 32% of 110, presumably this is the basis for the "30%" figure used in the Court's statement. As the text indicates, however, not all of these cases involved police officers approaching a parked vehicle. Whether any of the incidents involved routine traffic offenses, such as driving with an expired license tag, is not indicated in the study.

nine cases the suspect was outside the car talking to the officer when the shooting occurred.

These figures tell us very little about the risk associated with the routine traffic stop;[9] and they lend no support to the Court's assumption that ordering the routine traffic offender out of his car significantly enhances the officer's safety. Arguably, such an order could actually aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this area of human behavior strongly recommend that the police officer "never allow the violator to get out of the car . . . ."[10]

Obviously, it is not my purpose to express an opinion on the

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[9] Over the past 10 years, more than 1,000 police officers have been murdered. FBI, Uniform Crime Reports 289 (1976). Approximately 10% of those killings, or about 11 each year, occurred during "traffic pursuits and stops," but it is not clear how many of those pursuits and stops involved offenses such as reckless or high-speed driving, rather than offenses such as driving on an expired license, or how often the shootings could have been avoided by ordering the driver to dismount.

[10] "2. *Never allow the violator to get out of the car* and stand to its left. If he does get out, which should be avoided, walk him to the rear and right side of the car. Quite obviously this is a much safer area to conduct a conversation." V. Folley, Police Patrol Techniques and Tactics 95 (1973) (emphasis in original).

Another authority is even more explicit:

"The officer should stand slightly to the rear of the front door and doorpost. This will prevent the violator from suddenly opening the door and striking the officer. In order to thoroughly protect himself as much as possible, the officer should reach with his weak hand and push the lock button down if the window is open. This will give an indication to the driver that he is to remain inside the vehicle. It will also force the driver to turn his head to talk with the officer.

"The officer should advise the violator why he was stopped and then explain what action the officer intends to take, whether it is a verbal or written warning, or a written citation. If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and

safest procedure to be followed in making traffic arrests or to imply that the arresting officer faces no significant hazard, even in the apparently routine situation. I do submit, however, that no matter how hard we try we cannot totally eliminate the danger associated with law enforcement, and that, before adopting a nationwide rule, we should give further consideration to the infinite variety of situations in which today's holding may be applied.

The Court cannot seriously believe that the risk to the arresting officer is so universal that his safety is *always* a reasonable justification for ordering a driver out of his car. The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high-speed chase through a high-crime area late at night. Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person

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tell the driver to 'please stay in the car!' Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

"The officer should remain outside of the patrol unit to use the radio or to write a ticket. The recommended position for him at this time would be to the right side of the patrol unit. Should the driver of the violator vehicle make exit from his seat, the officer should direct the violator to the rear center of his vehicle or the front center area of the patrol unit. Preferably, the officer should verbally attempt to get the violator to re-enter and remain in the vehicle." A. Yount, Vehicle Stops Manual, Misdemeanor and Felony 2–3 (1976).

Conflicting advice is found in an earlier work, G. Payton, Patrol Procedure 298 (4th ed. 1971). It is worth noting that these authorities suggest that any danger to the officer from passing traffic may be greatly reduced by the simple and unintrusive expedient of parking the police car behind, and two or three feet to the left of, the offender's vehicle. Folley, *supra*, at 93; Payton, *supra*, at 301; Yount, *supra*, at 2.

in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority. Whether viewed from the standpoint of the officer's interest in his own safety, or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible.

Until today the law applicable to seizures of a person has required individualized inquiry into the reason for each intrusion, or some comparable guarantee against arbitrary harassment.[11] A factual demonstration of probable cause is required

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[11] Government instrusions must be justified with particularity in all but a few narrowly cabined contexts. Inspections pursuant to a general regulatory scheme and stops at border checkpoints are the best known exceptions to the particularity requirement. And even these limited exceptions fit within a broader rule—that the general populace should never be subjected to seizures without some assurance that the intruding officials are acting under a carefully limited grant of discretion. Health and safety inspections may be conducted only if the inspectors obtain warrants, though the warrants may be broader than the ordinary search warrant; officials may not wander at large in the city, conducting inspections without reason. *Camara* v. *Municipal Court*, 387 U. S. 523. Similar assurances of regularity and fairness can be found in public, fixed checkpoints:

"[C]heckpoint operations both appear to and actually involve less discretionary enforcement activity [than stops by roving patrols]. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of

to justify an arrest; an articulable reason to suspect criminal activity and possible violence is needed to justify a stop and frisk. But to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely.

The Court holds today that "third-class" seizures may be imposed without reason; how large this class of seizures may be or become we cannot yet know. Most narrowly, the Court has simply held that whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car. Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger. This is true even though the passenger has committed no traffic offense. If the rule were limited to situations in which individualized inquiry identified a basis for concern in particular cases, then the character of the violation might justify different treatment of the driver and the passenger. But when the justification rests on nothing more than an assumption about the danger associated with every stop—no matter how trivial

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individuals than . . . in the case of roving-patrol stops." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 559.

There is, of course, a general rule authorizing searches incident to full custodial arrests, but in such cases an individualized determination of probable cause adequately justifies both the search and the seizure. In that situation, unlike this one, the intrusion on the citizen's liberty is "strictly circumscribed by the exigencies which justify its initiation." *Terry* v. *Ohio*, 392 U. S. 1, 26. In this case, there was no custodial arrest, and I assume (perhaps somewhat naively) that the offense which gave rise to the stop of Mimms' car would not have warranted a full custodial arrest without some additional justification. See *Gustafson* v. *Florida*, 414 U. S. 260, 266–267 (STEWART, J., concurring); *id.*, at 238 n. 2 (POWELL, J., concurring).

the offense—the new rule must apply to the passenger as well as to the driver.

If this new rule is truly predicated on a safety rationale—rather than a desire to permit pretextual searches—it should also justify a frisk for weapons, or at least an order directing the driver to lean on the hood of the car with legs and arms spread out. For unless such precautionary measures are also taken, the added safety—if any—in having the driver out of the car is of no value when a truly dangerous offender happens to be caught.[12]

I am not yet persuaded that the interest in police safety requires the adoption of a standard any more lenient than that permitted by *Terry* v. *Ohio*.[13] In this case the offense might well have gone undetected if respondent had not been ordered out of his car, but there is no reason to assume that he otherwise would have shot the officer. Indeed, there has been no showing of which I am aware that the *Terry* standard will not provide the police with a sufficient basis to take appropriate protective measures whenever there is any real basis for concern. When that concern does exist, they should be able to frisk a violator, but I question the need to eliminate the requirement of an articulable justification in each case and to authorize the indiscriminate invasion of the liberty of every citizen stopped for a traffic violation, no matter how petty.

Even if the Pennsylvania Supreme Court committed error, that is not a sufficient justification for the exercise of this

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[12] *Terry* v. *Ohio*, *supra*, at 33 (Harlan, J., concurring):

"Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet."

[13] I do not foreclose the possibility that full argument would convince me that the Court's analysis of the merits is correct. My limited experience has convinced me that one's initial impression of a novel issue is frequently different from his final evaluation.

Court's discretionary power to grant review, or for the summary disposition of a novel constitutional question. For this kind of disposition gives rise to an unacceptable risk of error and creates "the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights." *Idaho Dept. of Employment* v. *Smith*, *ante*, at 105 (STEVENS, J., dissenting in part).

I respectfully dissent from the grant of certiorari and from the decision on the merits without full argument and briefing.

NEW YORK *v.* CATHEDRAL ACADEMY

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 76–616. Argued October 3, 1977—Decided December 6, 1977

A three-judge District Court issued a judgment (later affirmed by this Court) declaring unconstitutional a New York statute (1970 N. Y. Laws, ch. 138) that authorized reimbursement to nonpublic schools for state-mandated recordkeeping and testing services, and permanently enjoining any payments under the Act, including reimbursement for expenses that such schools had already incurred in the last half of the 1971–1972 school year. Thereafter the New York State Legislature enacted 1972 N. Y. Laws, ch. 996, authorizing reimbursement to sectarian schools for their expenses of performing the state-required services through the 1971–1972 school year. Appellee sectarian school brought this reimbursement action under ch. 996 in the New York Court of Claims, which held that the statute violated the First and Fourteenth Amendments. The New York Court of Appeals, being of the view that ch. 996 comported with this Court's decision in *Lemon* v. *Kurtzman*, 411 U. S. 192 (*Lemon II*), ultimately reversed, and remanded the case for a determination of the amount of appellee's claim. In that case, after a state statute authorizing payments to sectarian schools for specified secular services had been struck down (in *Lemon* v. *Kurtzman*, 403 U. S. 602 (*Lemon I*)) and the trial court on remand had enjoined payments under the statute for any services performed after that decision but had not prohibited payments for services provided before that date, the Court approved such disposition on the ground that equitable flexibility permitted weighing the "remote possibility of constitutional harm from allowing the State to keep its bargain" against the substantial reliance of the schools that had incurred expenses at the State's express invitation. *Held:*

1. This Court has jurisdiction of this appeal as the Court of Appeals' decision was a final determination of the federal constitutional issue and is ripe for appellate review under 28 U. S. C. § 1257 (2). P. 128.

2. Chapter 996 violates the First Amendment as made applicable to the States by the Fourteenth because it will necessarily have the primary effect of aiding religion, or will result in excessive state involvement in religious affairs. *Lemon II* distinguished. Pp. 128–133.

(a) Here (contrary to the situation in *Lemon II*) the District Court had expressly enjoined payments for amounts "*heretofore* or hereafter expended." To approve enactment of ch. 996, which thus

was inconsistent with the District Court's order, would expand the reasoning of *Lemon II* to hold that a state legislature may effectively modify a federal court's injunction whenever a balancing of constitutional equities might conceivably have justified the court's granting similar relief in the first place. Pp. 128–130.

(b) If ch. 996 authorizes payments for the identical services that were to be reimbursed under ch. 138, it is for the identical reasons invalid. Pp. 130–131.

(c) Even if, as appellee contends, the Court of Claims was authorized to make an audit on the basis of which it would authorize reimbursement of sectarian schools only for clearly secular purposes, such a detailed inquiry would itself encroach upon the First and Fourteenth Amendments by making that court the arbiter of an essentially religious dispute. Pp. 131–133.

3. Contrary to *Lemon II*, the equities do not support what the state legislature has done in ch. 996, which constitutes a new and independently significant infringement of the First and Fourteenth Amendments. Moreover, appellee could have relied on ch. 138 only by spending its own funds for nonmandated, and perhaps sectarian, activities that it might otherwise not have been able to afford. Pp. 133–134.

39 N. Y. 2d 1021, 355 N. E. 2d 300, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., and REHNQUIST, J., filed a dissenting statement, *post*, p. 134. WHITE, J., filed a dissenting opinion, *post*, p. 134.

Jean M. Coon, Assistant Solicitor General of New York, argued the cause for appellant. With her on the brief were *Louis J. Lefkowitz*, Attorney General, *Ruth Kessler Toch*, Solicitor General, and *Kenneth Connolly*, Assistant Attorney General.

Richard E. Nolan argued the cause for appellee. With him on the brief was *Thomas J. Aquilino, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In April of 1972 a three-judge United States District Court for the Southern District of New York declared unconstitutional New York's Mandated Services Act, 1970 N. Y. Laws,

ch. 138, which authorized fixed payments to nonpublic schools as reimbursement for the cost of certain recordkeeping and testing services required by state law. *Committee for Public Education & Religious Liberty* v. *Levitt*, 342 F. Supp. 439. The court's order permanently enjoined any payments under the Act, including reimbursement for expenses that schools had already incurred in the last half of the 1971–1972 school year.[1] This Court subsequently affirmed that judgment. *Levitt* v. *Committee for Public Education*, 413 U. S. 472.

In June 1972 the New York State Legislature responded to the District Court's order by enacting ch. 996 of the 1972 N. Y. Laws. The Act "recognize[d] a moral obligation to provide a remedy whereby . . . schools may recover the complete amount of expenses incurred by them prior to June thirteenth[, 1972,] in reliance on" the invalidated ch. 138, and conferred jurisdiction on the New York Court of Claims "to hear, audit and determine" the claims of nonprofit private schools for such expenses. Thus the Act explicitly authorized what the District Court's injunction had prohibited: reimbursement to sectarian schools for their expenses of performing state-mandated services through the 1971–1972 academic year.

The appellee, Cathedral Academy, sued under ch. 996 in the Court of Claims, and the State defended on the ground that the Act was unconstitutional.[2] The Court of Claims agreed that ch. 996 violated the First and Fourteenth Amendments, and dismissed Cathedral Academy's suit. 77 Misc. 2d 977,

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[1] The order permanently enjoined "all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools." No. 70 Civ. 3251 (June 1, 1972).

[2] At oral argument the Assistant Solicitor General of New York said that the State of New York frequently defends against claims for payment on the ground that the enabling Act authorizing suit in the Court of Claims is unconstitutional.

354 N. Y. S. 2d 370. The Appellate Division affirmed, 47 App. Div. 2d 390, 366 N. Y. S. 2d 900, but the New York Court of Appeals, adopting a dissenting opinion in the Appellate Division, reversed and remanded the case to the Court of Claims for determination of the amount of the Academy's claim.[3] 39 N. Y. 2d 1021, 355 N. E. 2d 300. An appeal was taken to this Court, and we postponed further consideration of the question of our appellate jurisdiction until the hearing on the merits. 429 U. S. 1089. We conclude that the Court of Appeals' decision finally determined the federal constitutional issue and is ripe for appellate review in this Court under 28 U. S. C. § 1257 (2).[4]

I

The state courts and the parties have all considered this case to be controlled by the principles established in *Lemon* v. *Kurtzman*, 411 U. S. 192 (*Lemon II*), which concerned the permissible scope of a Federal District Court's injunction forbidding payments to sectarian schools under an unconstitutional state statute. Previously in that same litigation we had

[3] The dissenting judges in the Court of Appeals voted to affirm on the majority opinion in the Appellate Division. 39 N. Y. 2d, at 1022, 355 N. E. 2d 300. We shall refer to the dissenting opinion of Justice Herlihy in the Appellate Division, 47 App. Div. 2d 396, 366 N. Y. S. 2d 905, adopted by the majority in the Court of Appeals, as the opinion of the Court of Appeals.

[4] It is clear that the New York Court of Appeals has finally determined that under the principles established in *Lemon* v. *Kurtzman*, 411 U. S. 192 (*Lemon II*), the Academy and other schools in similar positions are entitled to prove claims for reimbursement under ch. 996. While the Court of Appeals remanded for an audit in the Court of Claims to determine the amount of the Academy's claim, and while the precise scope of the audit is unclear, we conclude for the reasons stated in Part II of the text below that no possible developments on remand could sufficiently minimize the risk of future constitutional harm to justify relief even under *Lemon II*'s balancing of constitutional and equitable considerations. Since further proceedings cannot remove or otherwise affect this threshold federal issue, the Court of Appeals' decision is final for purposes of review in this Court. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 478–480.

declared unconstitutional a Pennsylvania statute authorizing payments to sectarian schools for specific secular services provided under contract with the State, and remanded the case to the trial court for entry of an appropriate decree. *Lemon* v. *Kurtzman*, 403 U. S. 602 (*Lemon I*). On remand, the District Court enjoined payments under the statute for any services performed after the date of this Court's decision, but did not prohibit payments for services provided before that date. 348 F. Supp. 300, 301 n. 1 (ED Pa.). In *Lemon II* this Court affirmed the trial court's denial of retroactive injunctive relief against the State, noting that "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." 411 U. S., at 200 (footnote omitted).

The primary constitutional evil that the *Lemon II* injunction was intended to rectify was the excessive governmental entanglement inherent in Pennsylvania's elaborate procedures for ensuring that "educational services to be reimbursed by the State were kept free of religious influences." *Id.*, at 202. The payments themselves were assumed to be constitutionally permissible, since they were not to be directly supportive of any sectarian activities. Because the State's supervision had long since been completed with respect to expenses already incurred, the proposed payments were held to pose no continued threat of excessive entanglement. Two other problems having "constitutional overtones"—the impact of a final audit and the effect of funding even the entirely nonreligious activities of a sectarian school—threatened minimal harm "only once under special circumstances that will not recur." *Ibid.*

In this context this Court held that the unique flexibility of equity permitted the trial court to weigh the "remote possibility of constitutional harm from allowing the State to keep its bargain" against the substantial reliance of the schools that had incurred expenses at the express invitation of the State. The District Court, "applying familiar equitable principles," could properly decline to enter an injunction that

would do little if anything to advance constitutional interests while working considerable hardship on the schools. Cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321.

In the present case, however, the District Court did not limit its decree as the court had done in *Lemon II*, but instead expressly enjoined payments for amounts "*heretofore* or hereafter expended." See n. 1, *supra* (emphasis supplied). The state legislature thus took action inconsistent with the court's order when it passed ch. 996 upon its own determination that, because schools like the Academy had relied to their detriment on the State's promise of payment under ch. 138, the equities of the case demanded retroactive reimbursement. To approve the enactment of ch. 996 would thus expand the reasoning of *Lemon II* to hold that a state legislature may effectively modify a federal court's injunction whenever a balancing of constitutional equities might conceivably have justified the court's granting similar relief in the first place. But cf. *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 467. This rule would mean that every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment. Nothing in *Lemon II*, whose concern was to "examine the District Court's evaluation of the proper means of implementing an equitable decree," 411 U. S., at 200, suggests such a broad general principle.

But whether ch. 996 is viewed as an attempt at legislative equity or simply as a law authorizing payments from public funds to sectarian schools, the dispositive question is whether the payments it authorizes offend the First and Fourteenth Amendments.

II

The law at issue here, ch. 996, authorizes reimbursement for expenses incurred by the schools during the specified time period

> "in rendering services for examination and inspection in connection with administration, grading and the com-

> piling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation."

It expressly states that the basis for the legislation is the State's representation in the now invalidated ch. 138 that such expenses would be reimbursed. Thus, while ch. 996 provides for only one payment rather than many, and changes the method of administering the payments, nothing on the face of the statute indicates that payments under ch. 996 would differ in any substantial way from those authorized under ch. 138.

Unlike the constitutional defect in the state law before us in *Lemon I*, the constitutional invalidity of ch. 138 lay in the payment itself, rather than in the process of its administration. The New York statute was held to be constitutionally invalid because "the aid that [would] be devoted to secular functions [was] not identifiable and separable from aid to sectarian activities." *Levitt* v. *Committee for Public Education*, 413 U. S., at 480. This was so both because there was no assurance that the lump-sum payments reflected actual expenditures for mandated services, and because there was an impermissible risk of religious indoctrination inherent in some of the required services themselves. We noted in particular the "substantial risk that . . . examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Ibid.* Thus it can hardly be doubted that if ch. 996 authorizes payments for the identical services that were to be reimbursed under ch. 138, it is for the identical reasons invalid.

The Academy argues, however, that the Court of Appeals has construed the statute to require a detailed audit in the Court of Claims to "establish whether or not the amounts

claimed for mandated services constitute a furtherance of the religious purposes of the claimant." 47 App. Div. 2d, at 397, 366 N. Y. S. 2d, at 906. This language is said to require the Court of Claims to review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities. We find nothing in the opinions of the state courts to indicate that such an audit is authorized under ch. 996.[5]

But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove

[5] The Court of Claims dismissed the Academy's claim in part because it found no "enforceable standards or guidelines" in ch. 996 "which would enable this Court to separate and apportion the single per-pupil allotment among the various allowed purposes." 77 Misc. 2d, at 985, 354 N. Y. S. 2d, at 378. Thus it did not believe that ch. 996 authorized it to reimburse schools only for clearly secular expenses, such as the cost of maintaining attendance and medical records, while refusing payments for other "allowed purposes" such as in-class examinations that this Court had held impermissible. The opinion of the Court of Appeals does not contradict this interpretation.

While the language quoted in the text is somewhat ambiguous, it appears that the Court of Appeals interpreted ch. 996 to require an audit similar to the post-audit contemplated in *Lemon II*, in which "the burden will be upon the claimant to prove that the items of its claims are in fact solely for mandated services . . . ." 47 App. Div. 2d, at 400, 366 N. Y. S. 2d, at 908. As was made clear in *Levitt* v. *Committee for Public Education*, 413 U. S. 472, however, limiting reimbursement to mandated services would not fully address the constitutional objections to ch. 138, since it would provide no assurance against reimbursement for sectarian mandated services. Thus, a post-audit like the one contemplated in *Lemon II*, which the Court characterized as a "ministerial 'cleanup' function," 411 U. S., at 202, would not in this case exclude payments that impermissibly aided religious purposes.

any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, see n. 2, *supra*, the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.

The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once. Cf. *Presbyterian Church* v. *Blue Hull Mem. Presb. Church*, 393 U. S. 440. When it is considered that ch. 996 contemplates claims by approximately 2,000 schools in amounts totaling over $11 million, the constitutional violation is clear.[6]

For the reasons stated, we hold that ch. 996 is unconstitutional because it will of necessity either have the primary effect of aiding religion, see *Levitt* v. *Committee for Public Education*, *supra*, or will result in excessive state involvement in religious affairs. See *Lemon I*, 403 U. S. 602.

III

But even assuming, as the New York Court of Appeals did, that under *Lemon II* a degree of constitutional infirmity may be tolerated in a state law if other equitable considerations predominate, we cannot agree that the equities support what the state legislature has done in ch. 996.

In *Lemon II* the constitutional vice of excessive entanglement was an accomplished fact that could not be undone by enjoining payments for expenses previously incurred. And

[6] The parties have considered the Academy's claim a test of the constitutionality of ch. 996. Claims filed by other schools have been stayed in the Court of Claims pending the resolution of this case.

precisely because past practices had clearly identified permissibly reimbursable secular expenses, an additional single payment was held not to threaten the additional constitutional harm of state support to religious activities. By contrast, ch. 996 amounts to a new and independently significant infringement of the First and Fourteenth Amendments.

Moreover the Academy's detrimental reliance on the promise of ch. 138 was materially different from the reliance of the schools in *Lemon II*. Unlike the Pennsylvania schools, the Academy was required by pre-existing state law to perform the services reimbursed under ch. 138. In essence, the Academy could have relied on ch. 138 only by spending its own funds for nonmandated, and perhaps sectarian, activities that it might not otherwise have been able to afford. While this Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aid to religious institutions, see *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736, 747, and n. 14 (plurality opinion), it is quite another matter to accord positive weight to such a reliance interest in the balance against a measurable constitutional violation.

Accordingly, the judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST believe that this case is controlled by the principles established in *Lemon* v. *Kurtzman*, 411 U. S. 192 (1973), and would therefore affirm the judgment of the Court of Appeals of New York.

MR. JUSTICE WHITE, dissenting.

Because the Court continues to misconstrue the First Amendment in a manner that discriminates against religion and is contrary to the fundamental educational needs of the

country, I dissent here as I have in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973); *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973); *Meek* v. *Pittenger*, 421 U. S. 349 (1975); and *Wolman* v. *Walter*, 433 U. S. 229 (1977).

NASHVILLE GAS CO. *v.* SATTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75–536. Argued October 5, 1977—Decided December 6, 1977

Petitioner employer requires a pregnant employee to take leave of absence. While on such leave the employee receives no sick pay, such as is paid for nonoccupational disabilities other than pregnancy. She also loses all accumulated job seniority, such as is retained on leaves for other nonoccupational disabilities, with the result that although petitioner will attempt to provide her with temporary work on her return, she will be employed in a permanent position only if no currently employed employee also applies for the position. In respondent employee's action challenging those policies, the District Court held that they violated Title VII of the Civil Rights Act of 1964, and the Court of Appeals affirmed. *Held:*

1. Petitioner's policy of denying employees returning from pregnancy leave their accumulated seniority acts both to deprive them "of employment opportunities" and to "adversely affect [their] status as an employee" because of their sex in violation of § 703 (a) (2) of Title VII. Pp. 139–143.

(a) While petitioner's seniority policy is facially neutral in that both male and female employees retain accumulated seniority while on leave for nonoccupational disabilities other than pregnancy, whereas seniority is divested if the employee takes a leave for any other reason, including pregnancy, its discriminatory effect causes it to run afoul of § 703 (a) (2). Pp. 140–141.

(b) Petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. While Title VII does not require that greater economic benefits be paid to one sex or the other because of their different roles, this does not allow § 703 (a) (2) to be read so as to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different roles. *General Electric Co.* v. *Gilbert*, 429 U. S. 125, distinguished. Pp. 141–142.

(c) There is no proof of any business necessity justifying the adoption of the seniority policy with respect to pregnancy leave in this case. P. 143.

2. Petitioner's policy of not awarding sick-leave pay to pregnant employees is not a *per se* violation of Title VII, but the facial neutrality of the policy does not end the analysis if it can be shown that exclusion of pregnancy from the compensation conditions is a mere "pretex[t] designed to effect an invidious discrimination against the members of one sex or the other." *Gilbert, supra,* at 136. Hence, absent any showing that the decisions below were based on a finding that there was a pretext, the case will be remanded to determine whether respondent preserved the right to proceed further on such theory. Pp. 143–146.

522 F. 2d 850, affirmed in part, vacated in part, and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined, and in Part I of which BRENNAN, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed an opinion concurring in the result and concurring in part, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 146. STEVENS, J., filed an opinion concurring in the judgment, *post,* p. 153.

Charles K. Wray argued the cause and filed briefs for petitioner.

Robert W. Weismueller, Jr., argued the cause and filed a brief for respondent.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner requires pregnant employees to take a formal leave of absence. The employee does not receive sick pay while on pregnancy leave. She also loses all accumulated job seniority; as a result, while petitioner attempts to provide the employee with temporary work upon her return, she will be employed in a permanent job position only if no employee presently working for petitioner also applies for the position. The United States District Court for the Middle District of Tennessee held that these policies violate Title VII of the Civil

*Briefs of *amici curiae* urging affirmance were filed by *Ruth Bader Ginsburg, Marjorie Mazen Smith, Joel Gora,* and *Judith Lichtman* for the American Civil Liberties Union et al.; and by *Stephen I. Schlossberg, John A. Fillion, J. Albert Woll,* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations et al.

Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V). 384 F. Supp. 765 (1974). The Court of Appeals for the Sixth Circuit affirmed. 522 F. 2d 850 (1975). We granted certiorari, 429 U. S. 1071, to decide, in light of our opinion last Term in *General Electric Co.* v. *Gilbert,* 429 U. S. 125 (1976), whether the lower courts properly applied Title VII to petitioner's policies respecting pregnancy.

Two separate policies are at issue in this case. The first is petitioner's practice of giving sick pay to employees disabled by reason of nonoccupational sickness or injury but not to those disabled by pregnancy. The second is petitioner's practice of denying accumulated seniority to female employees returning to work following disability caused by childbirth.[1] We shall discuss them in reverse order.

I

Petitioner requires an employee who is about to give birth to take a pregnancy leave of indeterminate length. Such an employee does not accumulate seniority while absent, but

[1] Respondent appears to believe that the two policies are indissolubly linked together, and that if one is found to violate Title VII the other must likewise be found to do so. Respondent herself, however, has not taken this tack throughout the course of her lawsuit. In the District Court she attacked not only the two policies at issue before us, but in addition petitioner's requirement that she commence her pregnancy leave five weeks prior to the delivery of her child, the termination of her temporary employment allegedly as retaliation for her complaint regarding petitioner's employment policies, and the lower benefits paid for pregnancy as compared to hospitalization for other causes under a group life, health, and accident policy paid for partly by petitioner and partly by its employees. The District Court concluded that respondent had not proved any of these practices to be violative of Title VII, and respondent did not appeal from that determination. Petitioner appealed from the District Court's conclusion that the two company policies presently in issue violate Title VII.

instead actually loses any job seniority accrued before the leave commenced. Petitioner will not hold the employee's job open for her awaiting her return from pregnancy leave. An employee who wishes to return to work from such leave will be placed in any open position for which she is qualified and for which no individual currently employed is bidding; before such time as a permanent position becomes available, the company attempts to find temporary work for the employee. If and when the employee acquires a permanent position, she regains previously accumulated seniority for purposes of pension, vacation, and the like, but does not regain it for the purpose of bidding on future job openings.

Respondent began work for petitioner on March 24, 1969, as a clerk in its Customer Accounting Department. She commenced maternity leave on December 29, 1972, and gave birth to her child on January 23, 1973. Seven weeks later she sought re-employment with petitioner. The position that she had previously held had been eliminated as a result of bona fide cutbacks in her department. Temporary employment was found for her at a lower salary than she had earned prior to taking leave. While holding this temporary employment, respondent unsuccessfully applied for three permanent positions with petitioner. Each position was awarded to another employee who had begun to work for petitioner before respondent had returned from leave; if respondent had been credited with the seniority that she had accumulated prior to leave, she would have been awarded any of the positions for which she applied. After the temporary assignment was completed, respondent requested, "due to lack of work and job openings," that petitioner change her status from maternity leave to termination in order that she could draw unemployment compensation.

We conclude that petitioner's policy of denying accumulated seniority to female employees returning from pregnancy leave violates § 703 (a)(2) of Title VII, 42 U. S. C. § 2000e–2 (a)(2)

(1970 ed., Supp. V). That section declares it to be an unlawful employment practice for an employer to

> "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's . . . sex . . . ."

On its face, petitioner's seniority policy appears to be neutral in its treatment of male and female employees.[2] If an employee is forced to take a leave of absence from a job because of disease or any disability other than pregnancy, the employee, whether male or female, retains accumulated seniority and, indeed, continues to accrue seniority while on leave.[3] If the employee takes a leave of absence for any other reason, including pregnancy, accumulated seniority is divested. Petitioner's decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy. "Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability." *Gilbert,* 429 U. S., at 136.

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[2] The appearance of neutrality rests in part on petitioner's contention that its pregnancy leave policy is identical to the formal leave of absence granted to employees, male or female, in order that they may pursue additional education. However, petitioner's policy of denying accumulated seniority to employees returning from leaves of absence has not to date been applied outside of the pregnancy context. Since 1962, only two employees have requested formal leaves of absence to pursue a college degree; neither employee has returned to work at petitioner.

[3] The District Court found that even "employees returning from long periods of absence due to non-job related injuries do not lose their seniority and in fact their seniority continues to accumulate while absent." 384 F. Supp. 765, 768 (1974). The record reveals that at least one employee was absent from work for 10 months due to a heart attack and yet returned to her previous job at the end of this period with full seniority dating back to her date of hire.

We have recognized, however, that both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of § 703 (a)(2). *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). It is beyond dispute that petitioner's policy of depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them "of employment opportunities" and to "adversely affect [their] status as an employee." It is apparent from the previous recitation of the events which occurred following respondent's return from pregnancy leave that petitioner's policy denied her specific employment opportunities that she otherwise would have obtained. Even if she had ultimately been able to regain a permanent position with petitioner, she would have felt the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, for the remainder of her career with petitioner.

In *Gilbert, supra,* there was no showing that General Electric's policy of compensating for all non-job-related disabilities except pregnancy favored men over women. No evidence was produced to suggest that men received more benefits from General Electric's disability insurance fund than did women; both men and women were subject generally to the disabilities covered and presumably drew similar amounts from the insurance fund. We therefore upheld the plan under Title VII.

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike,

which results from the facially evenhanded *inclusion* of risks." 429 U. S., at 138–139 (footnote omitted).

Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that § 703 (a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in 'the scheme of human existence,'" 429 U. S., at 139 n. 17. But that holding does not allow us to read § 703 (a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.[4]

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[4] Our conclusion that petitioner's job seniority policies violate Title VII finds support in the regulations of the Equal Employment Opportunity Commission (EEOC). 1972 guidelines of the EEOC specify that "[w]ritten and unwritten employment policies and practices involving . . . the accrual of seniority . . . and reinstatement . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10 (b) (1976). In *Gilbert*, we rejected another portion of this same guideline because it conflicted with prior, and thus more contemporaneous, interpretations of the EEOC, with interpretations of other federal agencies charged with executing legislation dealing with sex discrimination, and with the applicable legislative history of Title VII. We did not, however, set completely at naught the weight to be given the 1972 guideline. 429 U. S., at 143. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434 (1971).

The portion of the 1972 guideline which prohibits the practice under attack here is fully consistent with past interpretations of Title VII by the EEOC. See, *e. g.*, EEOC, First Annual Report, H. R. Doc. No. 86, 90th Cong., 1st Sess., 40 (1967); EEOC, First Annual Digest of Legal Interpretations, July 1965–July 1966, p. 21 (Opinion Letter GC 218–66 (June 23, 1966)); CCH EEOC Decisions (1973) ¶ 6084 n. 1 (Dec. 16, 1969); CCH EEOC Decisions (1973) ¶ 6184 (Dec. 4, 1970). Nor have we been pointed to any conflicting opinions of other federal agencies responsible for regulating in the field of sex discrimination. This portion of the 1972

Recognition that petitioner's facially neutral seniority system does deprive women of employment opportunities because of their sex does not end the inquiry under § 703 (a)(2) of Title VII. If a company's business necessitates the adoption of particular leave policies, Title VII does not prohibit the company from applying these policies to all leaves of absence, including pregnancy leaves; Title VII is not violated even though the policies may burden female employees. *Griggs, supra,* at 431; *Dothard* v. *Rawlinson,* 433 U. S. 321, 331–332, n. 14 (1977). But we agree with the District Court in this case that since there was no proof of any business necessity adduced with respect to the policies in question, that court was entitled to "assume no justification exists." [5] 384 F. Supp., at 771.

II

On the basis of the evidence presented to the District Court, petitioner's policy of not awarding sick-leave pay to pregnant employees is legally indistinguishable from the disability-insurance program upheld in *Gilbert.* As in *Gilbert,* petitioner compensates employees for limited periods of time during which the employee must miss work because of a non-job-related illness or disability. As in *Gilbert,* the compensation is not extended to pregnancy-related absences. We emphasized in *Gilbert* that exclusions of this kind are not *per se* violations of Title VII: "[A]n exclusion of pregnancy

guideline is therefore entitled to more weight than was the one considered in *Gilbert. Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944).

[5] Indeed, petitioner's policy of denying accumulated seniority to employees returning from pregnancy leave might easily conflict with its own economic and efficiency interests. In particular, as a result of petitioner's policy, inexperienced employees are favored over experienced employees; employees who have spent lengthy periods with petitioner and might be expected to be more loyal to the company are displaced by relatively new employees. Female employees may also be less motivated to perform efficiently in their jobs because of the greater difficulty of advancing through the firm.

from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U. S., at 136. Only if a plaintiff through the presentation of other evidence can demonstrate that exclusion of pregnancy from the compensated conditions is a mere " 'pretex[t] designed to effect an invidious discrimination against the members of one sex or the other' " does Title VII apply. *Ibid.*

In *Gilbert,* evidence had been introduced indicating that women drew substantially greater sums than did men from General Electric's disability-insurance program, even though it excluded pregnancy. *Id.,* at 130–131, nn. 9 and 10. But our holding did not depend on this evidence. The District Court in *Gilbert* expressly declined to find "that the present actuarial value of the coverage was equal as between men and women." *Id.,* at 131. We upheld the disability program on the ground "that neither [was] there a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan 'worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by the group or class from the program.' " *Id.,* at 138. When confronted by a facially neutral plan, whose only fault is underinclusiveness, the burden is on the plaintiff to show that the plan discriminates on the basis of sex in violation of Title VII. *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 425 (1975); *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973).

We again need not decide whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703 (a)(1). Cf. *McDonnell Douglas Corp., supra,* at 802–806. *Griggs* held that a violation of § 703 (a)(2) can be established by proof of a discriminatory effect. But it is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick-leave compensation program "would deprive any individual of employment opportunities" or "otherwise adversely affect his

status as an employee" in violation of § 703 (a)(2). The direct effect of the exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status. Plaintiff's attack in *Gilbert, supra,* was brought under § 703 (a)(1), which would appear to be the proper section of Title VII under which to analyze questions of sick-leave or disability payments.

Respondent failed to prove even a discriminatory effect with respect to petitioner's sick-leave plan. She candidly concedes in her brief before this Court that "petitioner's Sick Leave benefit plan is, in and of itself, for all intents and purposes, the same as the Weekly Sickness and Accident Insurance Plan examined in *Gilbert*" and that "if the exclusion of sick pay was the only manner in which respondent had been treated differently by petitioner, *Gilbert* would control." Brief for Respondent 10. Respondent, however, contends that because petitioner has violated Title VII by its policy respecting seniority following return from pregnancy leave, the sick-leave pay differentiation must also fall.

But this conclusion by no means follows from the premise. Respondent herself abandoned attacks on other aspects of petitioner's employment policies following rulings adverse to her by the District Court, a position scarcely consistent with her present one. We of course recognized both in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), and in *Gilbert* that the facial neutrality of an employee benefit plan would not end analysis if it could be shown that " 'distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other . . . .' " *Gilbert,* 429 U. S., at 135. Petitioner's refusal to allow pregnant employees to retain their accumulated seniority may be deemed relevant by the trier of fact in deciding whether petitioner's sick-leave plan was such a pretext. But it most certainly does not require such a finding by a trier of fact, to

say nothing of the making of such a finding as an original matter by this Court.

The District Court sitting as a trier of fact made no such finding in this case, and we are not advised whether it was requested to or not. The decision of the Court of Appeals was not based on any such finding, but instead embodied generally the same line of reasoning as the Court of Appeals for the Fourth Circuit followed in its opinion in *Gilbert* v. *General Electric Co.*, 519 F. 2d 661 (1975). Since we rejected that line of reasoning in our opinion in *Gilbert*, the judgment of the Court of Appeals with respect to petitioner's sick-pay policies must be vacated. That court and the District Court are in a better position than we are to know whether respondent adequately preserved in those courts the right to proceed further in the District Court on the theory which we have just described.[6]

Affirmed in part, vacated in part, and remanded.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in the result and concurring in part.

I join Part I of the opinion of the Court affirming the decision of the Court of Appeals that petitioner's policy denying

[6] Our Brother POWELL in his concurring opinion suggests that we also remand to allow respondent to develop a theory not articulated to us, *viz.*, that petitioner's sick-leave plan is monetarily worth more to men than to women. He suggests that this expansive remand is required because at the time respondent formulated her case she "had no reason to make the showing of gender-based discrimination required by *Gilbert*." *Post*, at 148. Respondent's complaint was filed in the District Court on July 1, 1974; a pretrial order was entered by that court setting forth the plaintiff's theory and the defendant's theory on August 28, 1974; and the District Court's memorandum and order for judgment were filed on November 4 and November 20, 1974, respectively. The first of the Court of Appeals cases which our Brother POWELL refers to is *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F. 2d 199 (CA3), which was decided on February 11, 1975. See

accumulated seniority for job-bidding purposes to female employees returning from pregnancy leave violates Title VII.[1]

I also concur in the result in Part II, for the legal status under Title VII of petitioner's policy of denying accumulated sick-pay benefits to female employees while on pregnancy leave requires further factual development in light of *General Electric Co.* v. *Gilbert,* 429 U. S. 125 (1976). I write separately, however, because the Court appears to have constricted unnecessarily the scope of inquiry on remand by holding prematurely that respondent has failed to meet her burden of establishing a prima facie case that petitioner's sick-leave policy is discriminatory under Title VII. This case was tried in the District Court and reviewed in the Court of Appeals before our decision in *Gilbert.* The appellate court upheld her claim in accord with the then uniform view of the Courts of Appeals that any disability plan that treated

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opinion of MR. JUSTICE BRENNAN dissenting in *General Electric Co.* v. *Gilbert,* 429 U. S., at 146. Not only at the time that respondent filed a complaint, but at the time the District Court rendered its decision, *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), had been very recently decided, and the most that can be said on respondent's behalf is that the question of whether the analysis of that case would be carried over to cognate sections of Title VII was an open one. Our opinion in *Gilbert* on this and other issues, of course, speaks for itself; we do not think it can rightly be characterized as so drastic a change in the law as it was understood to exist in 1974 as to enable respondent to raise or reopen issues on remand that she would not under settled principles be otherwise able to do. We assume that the Court of Appeals and the District Court will apply these latter principles in deciding what claims may be open to respondent on remand.

[1] I would add, however, that petitioner's seniority policy, on its face, does not "appea[r] to be neutral in its treatment of male and female employees." *Ante,* at 140. As the District Court noted below, "only pregnant women are required to take leave and thereby lose job bidding seniority and no leave is required in other non-work related disabilities . . . ." 384 F. Supp. 765, 771 (MD Tenn. 1974). This mandatory maternity leave is not "identical to the formal leave of absence granted to employees, male or female, in order that they may pursue additional education." *Ante,* at 140 n. 2.

pregnancy differently from other disabilities was *per se* violative of Title VII.[2] Since respondent had no reason to make the showing of gender-based discrimination required by *Gilbert*, I would follow our usual practice of vacating the judgment below and remanding to permit the lower court to reconsider its sick-leave ruling in light of our intervening decision.

The issue is not simply one of burden of proof, which properly rests with the Title VII plaintiff, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973), but of a "full opportunity for presentation of the relevant facts," *Harris* v. *Nelson*, 394 U. S. 286, 298 (1969). Given the meandering course that Title VII adjudication has taken, final resolution of a lawsuit in this Court often has not been possible because the parties or the lower courts proceeded on what was ultimately an erroneous theory of the case. Where the mistaken theory is premised on the pre-existing understanding of the law, and where the record as constituted does not foreclose the arguments made necessary by our ruling, I would prefer to remand the controversy and permit the lower courts to pass on the new contentions in light of whatever additional evidence is deemed necessary.

For example, in *Albemarle Paper Co.* v. *Moody*, *supra*, the Court approved the Court of Appeals' conclusion that the employer had not proved the job relatedness of its testing program, but declined to permit immediate issuance of an

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[2] See cases cited in *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 147 (1976) (BRENNAN, J., dissenting).

Gilbert held that the rationale articulated in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), involving a challenge on equal protection grounds, also applied to a Title VII claim with respect to the treatment of pregnancy in benefit plans. See 429 U. S., at 133–136. Since *Geduldig* itself was silent on the Title VII issue, the Courts of Appeals not unreasonably failed to anticipate the extent to which the *Geduldig* rationale would be deemed applicable in the statutory context. See *Washington* v. *Davis*, 426 U. S. 229, 246–248 (1976).

injunction against all use of testing in the plant. The Court thought that a remand to the District Court was indicated in part because "[t]he appropriate standard of proof for job relatedness has not been clarified until today," and the plaintiffs "have not until today been specifically apprised of their opportunity to present evidence that even validated tests might be a 'pretext' for discrimination in light of alternative selection procedures available to the Company." 422 U. S., at 436.

Similarly, in *Teamsters* v. *United States,* 431 U. S. 324 (1977), we found a remand for further factual development appropriate because the Government had employed an erroneous evidentiary approach that precluded satisfaction of its burden of identifying which nonapplicant employees were victims of the employer's unlawful discrimination and thus entitled to a retroactive seniority award. "While it may be true that many of the nonapplicant employees desired and would have applied for line-driver jobs but for their knowledge of the company's policy of discrimination, the Government must carry its burden of proof, with respect to each specific individual, at the remedial hearings to be conducted by the District Court on remand." *Id.,* at 371.[3] Cf. *Brown* v. *Illinois,* 422 U. S. 590, 613–616 (1975) (POWELL, J., concurring in part).

Here, respondent has abandoned the theory that enabled her to prevail in the District Court and the Court of Appeals. Instead, she urges that her case is distinguishable from *Gilbert:*

> "Respondent submits that because the exclusion of sick pay is only one of the many ways in which female

[3] The Court also declined to "evaluate abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the contractual rights of nonvictim employees," preferring to lodge this task, in the first instance, with the trial court which would be best able to deal with the problem in light of the facts developed at the hearings on remand. 431 U. S., at 376.

employees who experience pregnancy are treated differently by petitioner, the holding in *Gilbert* is not controlling. Upon examination of the overall manner in which female employees who experience pregnancy are treated by petitioner, it becomes plain that petitioner's policies are much more pervasive than the mere underinclusiveness of the Sickness and Accident Insurance Plan in *Gilbert*." Brief for Respondent 10.

At least two distinguishing characteristics are identified by respondent. First, as found by the District Court, only pregnant women are required to take a leave of absence and are denied sick-leave benefits while in all other cases of nonoccupational disability sick-leave benefits are available. 384 F. Supp. 765, 767, 771 (MD Tenn. 1974). Second, the sick-leave policy is necessarily related to petitioner's discriminatory denial of job-bidding seniority to pregnant women on mandatory maternity leave, presumably because both policies flow from the premise that a female employee is no longer in active service when she becomes pregnant.

Although respondent's theory is not fully articulated, she presents a plausible contention, one not required to have been raised until *Gilbert* and not foreclosed by the stipulated evidence of record, see *Gilbert*, 429 U. S., at 130–131, n. 9, and 131 n. 10, or the concurrent findings of the lower courts, see *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 270 (1977). It is not inconceivable that on remand respondent will be able to show that the combined operation of petitioner's mandatory maternity-leave policy[4]

[4] The majority places some reliance on respondent's failure to appeal from the part of the District Court's ruling which found petitioner's mandatory leave policy to be lawful under Title VII. *Ante*, at 138 n. 1, and 145. For the reasons stated in the text, however, petitioner's maintenance of a mandatory maternity-leave policy, even if entirely lawful, may have a bearing on the question whether the sick-pay policy "is in fact worth more to men than to women," *Gilbert*, 429 U. S., at 138.

and denial of accumulated sick-pay benefits yielded significantly less net compensation for petitioner's female employees than for the class of male employees. A number of the former, but not the latter, endured forced absence from work without sick pay or other compensation. The parties stipulated that between July 2, 1965, and August 27, 1974, petitioner had placed 12 employees on pregnancy leave, and that some of these employees were on leave for periods of two months or more. App. 33. It is possible that these women had not exhausted their sick-pay benefits at the time they were compelled to take maternity leave, and that the denial of sick pay for this period of absence resulted in a relative loss of net compensation for petitioner's female work force. Petitioner's male employees, on the other hand, are not subject to a mandatory leave policy, and are eligible to receive compensation in some form for any period of absence from work due to sickness or disability.

In short, I would not foreclose the possibility that the facts as developed on remand will support a finding that "the package is in fact worth more to men than to women." *Gilbert, supra,* at 138. If such a finding were made, I would view respondent's case as not barred by *Gilbert*.[5] In that case, the Court related: "The District Court noted the evidence introduced during the trial, a good deal of it stipulated, concerning the relative cost to General Electric of providing benefits under the Plan to male and female employees, all of which indicated that, with pregnancy-related disabilities excluded, the cost of the Plan to General Electric per female employee was at least as high as, if not substantially higher than, the cost per male employee." 429 U. S., at 130 (footnotes omitted). The District Court also "found that the inclusion of pregnancy-related disabilities within the scope of the Plan would 'increase G. E.'s [disability-benefits plan] costs

[5] Also, if the theory left open by the Court's remand is demonstrated, *Gilbert* will present no bar.

by an amount which, though large, is at this time undeterminable.' 375 F. Supp., at 378." *Id.*, at 131. While the District Court declined to make an explicit finding that the actuarial value of the coverage was equal between men and women, it may have been referring simply to the quantum and specificity of proof necessary to establish a "business necessity" defense. See *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367, 382–383 (ED Va. 1974). In any event, in *Gilbert* this Court viewed the evidence of record as precluding a prima facie showing of discrimination in "compensation" contrary to § 703 (a)(1). "Whatever the ultimate probative value of the evidence introduced before the District Court on this subject . . . , at the very least it tended to illustrate that the selection of risks covered by the Plan did not operate, in fact, to discriminate against women." 429 U. S., at 137–138. As the record had developed in *Gilbert*, there was no basis for a remand.

I do not view the record in this case as precluding a finding of discrimination in compensation within the principles enunciated in *Gilbert*.[6] I would simply remand the sick-pay

[6] The Court's opinion at one point appears to read *Gilbert* as holding that a Title VII plaintiff in a § 703 (a)(1) case must demonstrate that "exclusion of pregnancy from the compensated conditions is a mere 'pretex[t].'" *Ante*, at 144. Later in its opinion, the Court states that we need not decide "whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703 (a)(1)." *Ibid.* As noted in n. 1, *supra*, I cannot assume that petitioner's seniority policy in this case is facially neutral. Moreover, although there may be some ambiguity in the language in *Gilbert*, see concurring opinions of MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN, 429 U. S., at 146, I viewed our decision in that case as grounded primarily on the emphasized fact that no discrimination in compensation as required by § 703 (a)(1) had been shown. Indeed, a fair reading of the evidence in *Gilbert* demonstrated that the total compensation of women in terms of disability-benefit plans well may have exceeded that of men. I do not suggest that mathematical exactitude can or need be shown in every § 703 (a)(1) case. But essential equality in *compensation* for comparable work

issue for further proceedings in light of our decision in that case.

MR. JUSTICE STEVENS, concurring in the judgment.

Petitioner enforces two policies that treat pregnant employees less favorably than other employees who incur a temporary disability. First, they are denied seniority benefits during their absence from work and thereafter; second, they are denied sick pay during their absence. The Court holds that the former policy is unlawful whereas the latter is lawful. I concur in the Court's judgment, but because I believe that its explanation of the legal distinction between the two policies may engender some confusion among those who must make compliance decisions on a day-to-day basis, I advance a separate, and rather pragmatic, basis for reconciling the two parts of the decision with each other and with *General Electric Co.* v. *Gilbert*, 429 U. S. 125.

The general problem is to decide when a company policy which attaches a special burden to the risk of absenteeism caused by pregnancy is a prima facie violation of the statutory prohibition against sex discrimination. The answer "always," which I had thought quite plainly correct,[1] is foreclosed by the Court's holding in *Gilbert*. The answer "never" would seem

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is at the heart of § 703 (a)(1). In my view, proof of discrimination in this respect would establish a prima facie violation.

[1] "An analysis of the effect of a company's rules relating to absenteeism would be appropriate if those rules referred only to neutral criteria, such as whether an absence was voluntary or involuntary, or perhaps particularly costly. This case, however, does not involve rules of that kind.

"Rather, the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. The analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability insurance plan." *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 161–162 (STEVENS, J., dissenting).

to be dictated by the Court's view that a discrimination against pregnancy is "not a gender-based discrimination at all." [2] The Court has, however, made it clear that the correct answer is "sometimes." Even though a plan which frankly and unambiguously discriminates against pregnancy is "facially neutral," the Court will find it unlawful if it has a "discriminatory effect." [3] The question, then, is how to identify this discriminatory effect.

Two possible answers are suggested by the Court. The Court seems to rely on (a) the difference between a benefit and a burden, and (b) the difference between § 703 (a)(2) and § 703 (a)(1). In my judgment, both of these differences are illusory.[4] I agree with the Court that the effect of the respond-

[2] In *Gilbert, supra*, at 136, the Court held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." Consistently with that holding, the Court today states that a "decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy." *Ante*, at 140.

[3] *Ante*, at 141; 429 U. S., at 146 (STEWART, J., concurring); *ibid.* (BLACKMUN, J., concurring in part).

[4] Differences between benefits and burdens cannot provide a meaningful test of discrimination since, by hypothesis, the favored class is always benefited and the disfavored class is equally burdened. The grant of seniority is a benefit which is not shared by the burdened class; conversely, the denial of sick pay is a burden which the benefited class need not bear.

The Court's second apparent ground of distinction is equally unsatisfactory. The Court suggests that its analysis of the seniority plan is different because that plan was attacked under § 703 (a)(2) of Title VII, not § 703 (a)(1). Again, I must confess that I do not understand the relevance of this distinction. It is true that § 703 (a)(1) refers to "discrimination" and § 703 (a)(2) does not. But the Court itself recognizes that this is not significant since a violation of § 703 (a)(2) occurs when a facially neutral policy has a "*discriminatory effect*." *Ante*, at 141 (emphasis added). The Court also suggests that § 703 (a)(1) may contain a requirement of intent not present in § 703 (a)(2). Whatever the merits of that suggestion, it is apparent that it does not form the basis for any differentiation between the two subparagraphs of § 703 in this case, since the Court expressly refuses to decide the issue. *Ante*, at 144.

ent's seniority plan is significantly different from that of the General Electric disability plan in *Gilbert*, but I suggest that the difference may be described in this way: Although the *Gilbert* Court was unwilling to hold that discrimination against pregnancy—as compared with other physical disabilities—is discrimination on account of sex, it may nevertheless be true that discrimination against pregnant or formerly pregnant employees—as compared with other employees—does constitute sex discrimination. This distinction may be pragmatically expressed in terms of whether the employer has a policy which adversely affects a woman beyond the term of her pregnancy leave.

Although the opinion in *Gilbert* characterizes as "facially neutral" a company policy which differentiates between an absence caused by pregnancy and an absence caused by illness, the factual context of *Gilbert* limits the reach of that broad characterization. Under the Court's reasoning, the disability plan in *Gilbert* did not discriminate against pregnant employees or formerly pregnant employees while they were working for the company. If an employee, whether pregnant or nonpregnant, contracted the measles, he or she would receive disability benefits; moreover, an employee returning from maternity leave would also receive those benefits. On the other hand, pregnancy, or an illness occurring while absent on maternity leave, was not covered.[5] During that period of maternity leave, the pregnant woman was temporarily cut off from the benefits extended by the company's plan. At all other times, the woman was treated the same as other employees in terms of her eligibility for the plan's benefits.

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[5] See *Gilbert*, 429 U. S., at 129 n. 4. Although I have the greatest difficulty with the Court's holding in *Gilbert* that it was permissible to refuse coverage for an illness contracted during maternity leave, I suppose this aspect of *Gilbert* may be explained by the notion that any illness occurring at that time is treated as though it were attributable to pregnancy, and therefore is embraced within the area of permissible discrimination against pregnancy.

The Company's seniority plan in this case has a markedly different effect. In attempting to return to work, the formerly pregnant woman is deprived of all previously accumulated seniority. The policy affects both her ability to re-enter the work force, and her compensation when she does return.[6] The Company argues that these effects are permissible because they flow from its initial decision to treat pregnancy as an unexcused absence. But this argument misconceives the scope of the protection afforded by *Gilbert* to such initial decisions. For the General Electric plan did not attach any consequences to the condition of pregnancy that extended beyond the period of maternity leave. *Gilbert* allowed the employer to treat pregnancy leave as a temporal gap in the full employment status of a woman. During that period, the employer may treat the employee in a manner consistent with the determination that pregnancy is not an illness.[7] In this case, however, the Company's seniority policy has an adverse impact on the employee's status after pregnancy leave is terminated. The formerly pregnant person is permanently disadvantaged as compared to the rest of the work force. And since the persons adversely affected by this policy constitute an exclusively female class, the Company's plan has an obvious discriminatory effect.[8]

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[6] *Ante*, at 138–139.

[7] These two limitations—that the effect of the employer's policy be limited to the period of the pregnancy leave and that it be consistent with the determination that pregnancy is not an illness—serve to focus the disparate effect of the policy on pregnancy rather than on pregnant or formerly pregnant employees. Obviously, policies which attach a burden to pregnancy also burden pregnant or formerly pregnant persons. This consequence is allowed by *Gilbert*, but only to the extent that the focus of the policy is, as indicated above, on the physical condition rather than the person.

[8] This analysis is consistent with the approach taken by lower courts to post-*Gilbert* claims of pregnancy-based discrimination, which have recognized that *Gilbert* has "nothing to do with foreclosing employment opportunity." *Cook* v. *Arentzen*, 14 EPD ¶ 7544, p. 4702 (CA4 1977);

Under this analysis, it is clear that petitioner's seniority rule discriminating against formerly pregnant employees is invalid. It is equally clear that the denial of sick pay during maternity leave is consistent with the *Gilbert* rationale, since the Company was free to withhold those benefits during that period.[9]

As is evident from my dissent in *Gilbert*, I would prefer to decide this case on a simpler rationale. Since that preference is foreclosed by *Gilbert*, I concur in the Court's judgment on the understanding that as the law now stands, although some discrimination against pregnancy—as compared with other physical disabilities—is permissible, discrimination against pregnant or formerly pregnant employees is not.

MacLennan v. *American Airlines, Inc.*, 440 F. Supp. 466 (Va. 1977) (addressing the question of when, if ever, an employer can require an employee to take pregnancy leave). This case does not pose the issue of when an employer may require an employee to take pregnancy leave. *Ante*, at 138 n. 1.

[9] In his concurring opinion, MR. JUSTICE POWELL seems to suggest that, even when the employer's disparate treatment of a pregnant employee is limited to the period of the pregnancy leave, it may still violate Title VII if the company's rule has a greater impact on one sex than another. *Ante*, at 151–152. If this analysis does not require an overruling of *Gilbert* it must be applied with great caution, since the laws of probability would invalidate an inordinate number of rules on such a theory. It is not clear to me what showing, beyond "mathematical exactitude," see *ante*, at 152 n. 6, is necessary before this Court will hold that a classification, which is by definition gender specific, discriminates on the basis of sex. Usually, statistical disparities aid a court in determining whether an apparently neutral classification is, in effect, gender or race specific. Here, of course, statistics would be unnecessary to prove that point. In all events, I agree with the Court that this issue is not presented to us in this case, and accordingly concur in the Court's determination of the proper scope of the remand.

RICHMOND UNIFIED SCHOOL DISTRICT *v.* BERG

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75–1069. Argued October 5, 1977—Decided December 6, 1977

528 F. 2d 1208, vacated and remanded.

Arthur W. Walenta, Jr., argued the cause for petitioners. With him on the briefs was *John B. Clausen.*

Mary C. Dunlap argued the cause and filed a brief for respondent.*

PER CURIAM.

The judgment of the Court of Appeals, 528 F. 2d 1208, is vacated and the cause remanded for further consideration in light of *General Electric Co.* v. *Gilbert,* 429 U. S. 125 (1976), and *Nashville Gas Co.* v. *Satty, ante,* p. 136, and for consideration of possible mootness.

**Jerry D. Anker, Robert E. Nagle,* and *David Rubin* filed a brief for the National Education Assn. as *amicus curiae* urging affirmance.

Syllabus

UNITED STATES *v.* NEW YORK TELEPHONE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76–835. Argued October 3, 1977—Decided December 7, 1977

On the basis of an FBI affidavit stating that certain individuals were conducting an illegal gambling enterprise at a specified New York City address and that there was probable cause to believe that two telephones with different numbers were being used there to further the illegal activity, the District Court authorized the FBI to install and use pen registers with respect to the two telephones, and directed respondent telephone company to furnish the FBI "all information, facilities and technical assistance" necessary to employ the devices, which (without overhearing oral communications or indicating whether calls are completed) record the numbers dialed. The FBI was ordered to compensate respondent at prevailing rates. Respondent, though providing certain information, refused to lease to the FBI lines that were needed for unobtrusive installation of the pen registers, and thereafter filed a motion in the District Court to vacate that portion of the pen register order directing respondent to furnish facilities and technical assistance to the FBI, on the ground that such a directive could be issued only in connection with a wiretap order meeting the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The District Court ruled adversely to respondent, holding that pen registers are not governed by Title III; that the court had jurisdiction to authorize installation of the devices upon a showing of probable cause; and that it had authority to direct respondent to assist in the installation both under the court's inherent powers and under the All Writs Act, which gives federal courts authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Though agreeing with the District Court's Title III rationale, and concluding that district courts have power either inherently or as a logical derivative of Fed. Rule Crim. Proc. 41, to authorize pen register surveillance upon a probable-cause showing, the Court of Appeals, affirming in part and reversing in part, held that the District Court abused its discretion in ordering respondent to assist in installing and operating the pen registers, and expressed concern that such a requirement could establish an undesirable precedent for the authority of federal courts to impress unwilling aid on private third parties. *Held:*

1. Title III, which is concerned only with orders "authorizing or approving the *interception* of a wire or oral communication," does not govern the authorization of the use of pen registers, which do not "intercept" because they do not acquire the "contents" of communications as those terms are defined in the statute. Moreover, the legislative history of Title III shows that the definition of "intercept" was designed to exclude pen registers. Pp. 165–168.

2. The District Court under Fed. Rule Crim. Proc. 41 had power to authorize the installation of the pen registers, that Rule being sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause. Pp. 168–170.

3. The order compelling respondent to provide assistance was clearly authorized by the All Writs Act and comported with the intent of Congress. Pp. 171–178.

(a) The power conferred by the Act extends, under appropriate circumstances, to persons who (though not parties to the original action or engaged in wrongdoing) are in a position to frustrate the implementation of a court order or the proper administration of justice. Here respondent, which is a highly regulated public utility with a duty to serve the public, was not so far removed as a third party from the underlying controversy that its assistance could not permissibly be compelled by the order of the court based on a probable-cause showing that respondent's facilities were being illegally used on a continuing basis. Moreover, respondent concededly uses the devices for its billing operations, detecting fraud, and preventing law violations. And, as the Court of Appeals recognized, provision of a leased line by respondent was essential to fulfillment of the purpose for which the pen register order had been issued. Pp. 171–175.

(b) The District Court's order was consistent with a 1970 amendment to Title III providing that "[a]n order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier . . . furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively. . . ." Pp. 176–177.

538 F. 2d 956, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined; in Parts I, II, and III of which STEWART, J., joined; and in Part II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in part and dissenting in part, *post*, p. 178. STEVENS, J., filed an

opinion dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, and in Part II of which STEWART, J., joined, *post*, p. 178.

Deputy Solicitor General Wallace argued the cause for the United States and was on the brief as Acting Solicitor General. With him on the brief were *Assistant Attorney General Civiletti, Deputy Solicitor General Randolph, Harriet S. Shapiro, Jerome M. Feit,* and *Marc Philip Richman.*

George E. Ashley argued the cause for respondent. With him on the brief was *Frank R. Natoli.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers[1] to investigate offenses which there was probable cause to believe were being committed by means of the telephone.

I

On March 19, 1976, the United States District Court for the Southern District of New York issued an order authorizing agents of the Federal Bureau of Investigation (FBI) to install and use pen registers with respect to two telephones and directing the New York Telephone Co. (Company) to furnish the FBI "all information, facilities and technical assistance" necessary to employ the pen registers unobtrusively. The FBI was ordered to compensate the Company at prevailing rates for any assistance which it furnished. App. 6–7. The order was issued on the basis of an affidavit sub-

[1] A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed.

mitted by an FBI agent which stated that certain individuals were conducting an illegal gambling enterprise at 220 East 14th Street in New York City and that, on the basis of facts set forth therein, there was probable cause to believe that two telephones bearing different numbers were being used at that address in furtherance of the illegal activity. *Id.*, at 1–5. The District Court found that there was probable cause to conclude that an illegal gambling enterprise using the facilities of interstate commerce was being conducted at the East 14th Street address in violation of 18 U. S. C. §§ 371 and 1952, and that the two telephones had been, were currently being, and would continue to be used in connection with those offenses. Its order authorized the FBI to operate the pen registers with respect to the two telephones until knowledge of the numbers dialed led to the identity of the associates and confederates of those believed to be conducting the illegal operation or for 20 days, "whichever is earlier."

The Company declined to comply fully with the court order. It did inform the FBI of the location of the relevant "appearances," that is, the places where specific telephone lines emerge from the sealed telephone cable. In addition, the Company agreed to identify the relevant "pairs," or the specific pairs of wires that constituted the circuits of the two telephone lines. This information is required to install a pen register. The Company, however, refused to lease lines to the FBI which were needed to install the pen registers in an unobtrusive fashion. Such lines were required by the FBI in order to install the pen registers in inconspicuous locations away from the building containing the telephones. A "leased line" is an unused telephone line which makes an "appearance" in the same terminal box as the telephone line in connection with which it is desired to install a pen register. If the leased line is connected to the subject telephone line, the pen register can then be installed on the leased line at a remote location and be monitored from that point. The

Company, instead of providing the leased lines, which it conceded that the court's order required it to do, advised the FBI to string cables from the "subject apartment" to another location where pen registers could be installed. The FBI determined after canvassing the neighborhood of the apartment for four days that there was no location where it could string its own wires and attach the pen registers without alerting the suspects,[2] in which event, of course, the gambling operation would cease to function. App. 15–22.

On March 30, 1976, the Company moved in the District Court to vacate that portion of the pen register order directing it to furnish facilities and technical assistance to the FBI in connection with the use of the pen registers on the ground that such a directive could be issued only in connection with a wiretap order conforming to the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520 (1970 ed. and Supp. V). It contended that neither Fed. Rule Crim. Proc. 41 nor the All Writs Act, 28 U. S. C. § 1651 (a), provided any basis for such an order. App. 10–14. The District Court ruled that pen registers are not governed by the proscriptions of Title III because they are not devices used to intercept oral communications. It concluded that it had jurisdiction to authorize the installation of the pen registers upon a showing of probable cause and that both the All Writs Act and its inherent powers provided authority for the order directing the Company to assist in the installation of the pen registers.

On April 9, 1976, after the District Court and the Court of Appeals denied the Company's motion to stay the pen register order pending appeal, the Company provided the leased lines.[3]

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[2] The gambling operation was known to employ countersurveillance techniques. App. 21.

[3] On the same date another United States District Court judge extended the original order of March 19 for an additional 20 days. *Id.*, at 33.

The Court of Appeals affirmed in part and reversed in part, with one judge dissenting on the ground that the order below should have been affirmed in its entirety. *Application of United States in re Pen Register Order,* 538 F. 2d 956 (CA2 1976). It agreed with the District Court that pen registers do not fall within the scope of Title III and are not otherwise prohibited or regulated by statute. The Court of Appeals also concluded that district courts have the power, either inherently or as a logical derivative of Fed. Crim. Proc. 41, to authorize pen register surveillance upon an adequate showing of probable cause. The majority held, however, that the District Court abused its discretion in ordering the Company to assist in the installation and operation of the pen registers. It assumed, *arguendo,* that "a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company," but concluded that "in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." 538 F. 2d, at 961.[4] The majority expressed concern that "such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties" and that "there is no assurance that the court will always be able to protect [third parties] from excessive or overzealous Government activity or compulsion." *Id.,* at 962–963.[5]

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[4] The Court of Appeals recognized that "without [the Company's] technical aid, the order authorizing the use of a pen register will be worthless. Federal law enforcement agents simply cannot implement pen register surveillance without the Telephone Company's help. The assistance requested requires no extraordinary expenditure of time or effort by [the Company]; indeed, as we understand it, providing lease or private lines is a relatively simple, routine procedure." 538 F. 2d, at 961–962.

[5] Judge Mansfield dissented in part on the ground that the District Court possessed a discretionary power under the All Writs Act to direct the

We granted the United States' petition for certiorari challenging the Court of Appeals' invalidation of the District Court's order against respondent.[6] 429 U. S. 1072.

II

We first reject respondent's contention, which is renewed here, that the District Court lacked authority to order the Company to provide assistance because the use of pen registers may be authorized only in conformity with the procedures set forth in Title III [7] for securing judicial authority to inter-

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Company to render such assistance as was necessary to implement its valid order authorizing the use of pen registers and that a compelling case had been established for the exercise of discretion in favor of the assistance order. He argued that district court judges could be trusted to exercise their powers under the All Writs Act only in cases of clear necessity and to balance the burden imposed upon the party required to render assistance against the necessity.

[6] Although the pen register surveillance had been completed by the time the Court of Appeals issued its decision on July 13, 1976, this fact does not render the case moot, because the controversy here is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911); *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). Pen register orders issued pursuant to Fed. Rule Crim. Proc. 41 authorize surveillance only for brief periods. Here, despite expedited action by the Court of Appeals, the order, as extended, expired six days after oral argument. Moreover, even had the pen register order been stayed pending appeal, the mootness problem would have remained, because the showing of probable cause upon which the order authorizing the installation of the pen registers was based would almost certainly have become stale before review could have been completed. It is also plain, given the Company's policy of refusing to render voluntary assistance in installing pen registers and the Government's determination to continue to utilize them, that the Company will be subjected to similar orders in the future. See *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975).

[7] The Court of Appeals held that pen register surveillance was subject to the requirements of the Fourth Amendment. This conclusion is not challenged by either party, and we find it unnecessary to consider the matter. The Government concedes that its application for the pen register order did not conform to the requirements of Title III.

cept wire communications.[8] Both the language of the statute and its legislative history establish beyond any doubt that pen registers are not governed by Title III.[9]

Title III is concerned only with orders "authorizing or approving the *interception* of a wire or oral communication . . . ." 18 U. S. C. § 2518 (1) (emphasis added).[10] Congress defined "intercept" to mean "the *aural* acquisition of the *contents* of any wire or oral *communication* through the use of any electronic, mechanical, or other device." 18 U. S. C.

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[8] Although neither this issue nor that of the scope of Fed. Rule Crim. Proc. 41 is encompassed within the question posed in the petition for certiorari and the Company has not filed a cross-petition, we have discretion to consider them because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted. *Langnes* v. *Green*, 282 U. S. 531, 538–539 (1931); *Dandridge* v. *Williams*, 397 U. S. 471, 475 n. 6 (1970). The only relief sought by the Company is that granted by the Court of Appeals: the reversal of the District Court's order directing it to assist in the installation and operation of the pen registers. The Title III and Rule 41 questions were considered by both the District Court and the Court of Appeals and fully argued here.

[9] Four Justices reached this conclusion in *United States* v. *Giordano*, 416 U. S. 505, 553–554 (1974) (POWELL, J., joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., concurring in part and dissenting in part). The Court's opinion did not reach the issue since the evidence derived from a pen register was suppressed as being in turn derived from an illegal wire interception. Every Court of Appeals that has considered the matter has agreed that pen registers are not within the scope of Title III. See *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (CA7 1976); *United States* v. *Southwestern Bell Tel. Co.*, 546 F. 2d 243 (CA8 1976); *Michigan Bell Tel. Co.* v. *United States*, 565 F. 2d 385 (CA6 1977); *United States* v. *Falcone*, 505 F. 2d 478 (CA3 1974), cert. denied, 420 U. S. 955 (1975); *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254 (CA9 1977); *United States* v. *Clegg*, 509 F. 2d 605, 610 n. 6 (CA5 1975).

[10] Similarly, the sanctions of Title III are aimed only at one who "willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . ." 18 U. S. C. § 2511 (1) (a).

§ 2510 (4) (emphasis added). Pen registers do not "intercept" because they do not acquire the "contents" of communications, as that term is defined by 18 U. S. C. § 2510 (8).[11] Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers. Furthermore, pen registers do not accomplish the "aural acquisition" of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or the pressing of buttons on pushbutton telephones) and present the information in a form to be interpreted by sight rather than by hearing.[12]

The legislative history confirms that there was no congressional intent to subject pen registers to the requirements of Title III. The Senate Report explained that the definition of "intercept" was designed to exclude pen registers:

> "Paragraph 4 [of § 2510] defines 'intercept' to include the aural acquisition of the contents of any wire or oral communication by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. . . . The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example, would be permissible. But see *United States* v. *Dote*, 371 F. 2d 176 (7th 1966). The proposed legislation is intended to protect the privacy of the communication itself and not the means of

[11] " 'Contents' . . . includes any information concerning the identity of the parties to [the] communication or the existence, substance, purport, or meaning of [the] communication."

[12] See 538 F. 2d, at 957.

communication." S. Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968).[13]

It is clear that Congress did not view pen registers as posing a threat to privacy of the same dimension as the interception of oral communications and did not intend to impose Title III restrictions upon their use.

III

We also agree with the Court of Appeals that the District Court had power to authorize the installation of the pen registers.[14] It is undisputed that the order in this case was predicated upon a proper finding of probable cause, and no claim is made that it was in any way inconsistent with the

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[13] *United States* v. *Dote*, 371 F. 2d 176 (CA7 1966), held that § 605 of the Communications Act of 1934, 47 U. S. C. § 605, which prohibited the interception and divulgence of "any communication" by wire or radio, included pen registers within the scope of its ban. In § 803 of Title III, 82 Stat. 223, Congress amended § 605 by restricting it to the interception of "any radio communication." Thus it is clear that pen registers are no longer within the scope of § 605. See *Korman* v. *United States*, 486 F. 2d 926, 931–932 (CA7 1973). The reference to *Dote* in the Senate Report is indicative of Congress' intention not to place restrictions upon their use. We find no merit in the Company's suggestion that the reference to *Dote* is merely an oblique expression of Congress' desire that telephone companies be permitted to use pen registers in the ordinary course of business, as *Dote* allowed, so long as they are not used to assist law enforcement. Brief for Respondent 16. The sentences preceding the reference to *Dote* state unequivocally that pen registers are not within the scope of Title III. In addition, a separate provision of Title III, 18 U. S. C. § 2511 (2) (a) (i), specifically excludes all normal telephone company business practices from the prohibitions of the Act. Congress clearly intended to disavow *Dote* to the extent that it prohibited the use of pen registers by law enforcement authorities.

[14] The Courts of Appeals that have considered the question have agreed that pen register orders are authorized by Fed. Rule Crim. Proc. 41 or by an inherent power closely akin to it to issue search warrants under circumstances conforming to the Fourth Amendment. See *Michigan Bell Tel. Co., supra; Southwestern Bell Tel. Co., supra; Illinois Bell Tel. Co., supra.*

Fourth Amendment. Federal Rule Crim. Proc. 41 (b) authorizes the issuance of a warrant to:

> "search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense."

This authorization is broad enough to encompass a "search" designed to ascertain the use which is being made of a telephone suspected of being employed as a means of facilitating a criminal venture and the "seizure" of evidence which the "search" of the telephone produces. Although Rule 41 (h) defines property "to include documents, books, papers and any other tangible objects," it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41.[15] Indeed, we recognized in *Katz* v. *United States*, 389 U. S. 347 (1967), which held that telephone conversations were protected by the Fourth Amendment, that Rule 41 is not limited to tangible items but is sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause. 389 U. S., at 354–356, and n. 16.[16] See also *Osborn* v. *United States*, 385 U. S. 323, 329–331 (1966).

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[15] Where the definition of a term in Rule 41 (h) was intended to be all inclusive, it is introduced by the phrase "to mean" rather than "to include." Cf. *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125 n. 1 (1934).

[16] The question of whether the FBI, in its implementation of the District Court's pen register authorization, complied with all the requirements of Rule 41 is not before us. In *Katz*, the Court stated that the notice requirement of Rule 41 (d) is not so inflexible as to require invariably that notice be given the person "searched" prior to the commencement of the search. 389 U. S., at 355–356, n. 16. Similarly, it is clear to us that the requirement of Rule 41 (c) that the warrant command that the search be conducted within 10 days of its issuance does not mean that the duration of a pen register surveillance may not exceed 10 days. Thus

Our conclusion that Rule 41 authorizes the use of pen registers under appropriate circumstances is supported by Fed. Rule Crim. Proc. 57 (b), which provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." [17] Although we need not and do not decide whether Rule 57 (b) by itself would authorize the issuance of pen register orders, it reinforces our conclusion that Rule 41 is sufficiently broad to include seizures of intangible items such as dial impulses recorded by pen registers as well as tangible items.

Finally, we could not hold that the District Court lacked any power to authorize the use of pen registers without defying the congressional judgment that the use of pen registers "be permissible." S. Rep. No. 1097, *supra*, at 90. Indeed, it would be anomalous to permit the recording of conversations by means of electronic surveillance while prohibiting the far lesser intrusion accomplished by pen registers. Congress intended no such result. We are unwilling to impose it in the absence of some showing that the issuance of such orders would be inconsistent with Rule 41. Cf. Rule 57 (b), *supra*.[18]

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the District Court's order, which authorized surveillance for a 20-day period, did not conflict with Rule 41.

[17] See *United States* v. *Baird*, 414 F. 2d 700, 710 (CA2 1969), cert. denied, 396 U. S. 1005 (1970); *Jackson* v. *United States*, 122 U. S. App. D. C. 324, 326, 353 F. 2d 862, 864 (1965); *United States* v. *Remolif*, 227 F. Supp. 420, 423 (Nev. 1964); *Link* v. *Wabash R. Co.*, 370 U. S. 626, 633 n. 8 (1962) (applying the analogous provision of Fed. Rule Civ. Proc. 83).

[18] The dissent argues, *post*, at 182–184, that Rule 41 (b), as modified following *Warden* v. *Hayden*, 387 U. S. 294 (1967), to explicitly authorize searches for any property that constitutes evidence of a crime, falls short of authorizing warrants to "search" for and "seize" intangible evidence. The elimination of the restriction against seizing property that is "mere evidence," however, has no bearing whatsoever on the scope of the definition of property set forth in Rule 41 (h) which, as the dissent acknowledges, remained unchanged. Moreover, the definition of property set forth in

IV

The Court of Appeals held that even though the District Court had ample authority to issue the pen register warrant and even assuming the applicability of the All Writs Act, the order compelling the Company to provide technical assistance constituted an abuse of discretion. Since the Court of Appeals conceded that a compelling case existed for requiring the assistance of the Company and did not point to any fact particular to this case which would warrant a finding of abuse of discretion, we interpret its holding as generally barring district courts from ordering any party to assist in the installation or operation of a pen register. It was apparently concerned that sustaining the District Court's order would authorize courts to compel third parties to render assistance without limitation regardless of the burden involved and pose a severe threat to the autonomy of third parties who for whatever reason prefer not to render such assistance. Consequently the Court of Appeals concluded that courts should not

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Rule 41 (h) is introduced by the phrase, "[t]he term 'property' is used in this rule to *include*" (emphasis added), which indicates that it was not intended to be exhaustive. See *supra*, at 169.

We are unable to comprehend the logic supporting the dissent's contention, *post*, at 184–185, that the conclusion of *Katz* v. *United States* that Rule 41 was not confined to tangible property did not survive the enactment of Title III and Title IX of the Omnibus Crime Control and Safe Streets Act of 1968, because Congress failed to expand the definition of property contained in Rule 41 (h). There was obviously no need for any such action in light of the Court's construction of the Rule in *Katz*. The dissent's assertion that it "strains credulity" to conclude that Congress intended to permit the seizure of intangibles outside the scope of Title III without its safeguards disregards the congressional judgment that the use of pen registers be permissible without Title III restrictions. Indeed, the dissent concedes that pen registers are not governed by Title III. What "strains credulity" is the dissent's conclusion, directly contradicted by the legislative history of Title III, that Congress intended to permit the interception of telephone conversations while prohibiting the use of pen registers to obtain much more limited information.

embark upon such a course without specific legislative authorization. We agree that the power of federal courts to impose duties upon third parties is not without limits; unreasonable burdens may not be imposed. We conclude, however, that the order issued here against respondent was clearly authorized by the All Writs Act and was consistent with the intent of Congress.[19]

The All Writs Act provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a).

The assistance of the Company was required here to implement a pen register order which we have held the District Court was empowered to issue by Rule 41. This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained: "This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve "the rational ends of law."'" *Harris* v. *Nelson*, 394 U. S. 286, 299 (1969), quoting *Price* v. *Johnston*, 334 U. S. 266, 282 (1948). Indeed, "[u]nless appropriately confined by

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[19] The three other Courts of Appeals which have considered the question reached a different conclusion from the Second Circuit. The Sixth Circuit in *Michigan Bell Tel. Co.* v. *United States*, 565 F. 2d 385 (1977), and the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (1976), held that the Act did authorize the issuance of orders compelling a telephone company to assist in the use of surveillance devices not covered by Title III such as pen registers. The Eighth Circuit found such authority to be part of the inherent power of district courts and "concomitant of the power to authorize pen register surveillance." *United States* v. *Southwestern Bell Tel. Co.*, 546 F. 2d, at 246.

Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273 (1942).

The Court has consistently applied the Act flexibly in conformity with these principles. Although § 262 of the Judicial Code, the predecessor to § 1651, did not expressly authorize courts, as does § 1651, to issue writs "appropriate" to the proper exercise of their jurisdiction but only "necessary" writs, *Adams* held that these supplemental powers are not limited to those situations where it is "necessary" to issue the writ or order "in the sense that the court could not otherwise physically discharge its appellate duties." 317 U. S., at 273. In *Price* v. *Johnston, supra*, § 262 supplied the authority for a United States Court of Appeals to issue an order commanding that a prisoner be brought before the court for the purpose of arguing his own appeal. Similarly, in order to avoid frustrating the "very purpose" of 28 U. S. C. § 2255, § 1651 furnished the District Court with authority to order that a federal prisoner be produced in court for purposes of a hearing. *United States* v. *Hayman*, 342 U. S. 205, 220–222 (1952). The question in *Harris* v. *Nelson, supra*, was whether, despite the absence of specific statutory authority, the District Court could issue a discovery order in connection with a habeas corpus proceeding pending before it. Eight Justices agreed that the district courts have power to require discovery when essential to render a habeas corpus proceeding effective. The Court has also held that despite the absence of express statutory authority to do so, the Federal Trade Commission may petition for, and a Court of Appeals may issue, pursuant to § 1651, an order preventing a merger pending hearings before the Commission to avoid impairing or frustrating the Court of Appeals' appellate jurisdiction. *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966).

The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, *Mississippi Valley Barge Line Co.* v. *United States*, 273 F. Supp. 1, 6 (ED Mo. 1967), summarily aff'd, 389 U. S. 579 (1968); *Board of Education* v. *York*, 429 F. 2d 66 (CA10 1970), cert. denied, 401 U. S. 954 (1971), and encompasses even those who have not taken any affirmative action to hinder justice. *United States* v. *McHie*, 196 F. 586 (ND Ill. 1912); *Field* v. *United States*, 193 F. 2d 92, 95–96 (CA2), cert. denied, 342 U. S. 894 (1951).[20]

Turning to the facts of this case, we do not think that the Company was a third party so far removed from the underlying controversy that its assistance could not be permissibly compelled. A United States District Court found that there was probable cause to believe that the Company's facilities were being employed to facilitate a criminal enterprise on a continuing basis. For the Company, with this knowledge, to refuse to supply the meager assistance required by the FBI in its efforts to put an end to this venture threatened obstruction of an investigation which would determine whether the Company's facilities were being lawfully used. Moreover, it can hardly be contended that the Company, a highly regulated public utility with a duty to serve the public,[21] had a substantial interest in not providing assistance. Certainly the use of pen registers is by no means offensive to it. The Company concedes that it regularly employs such devices without court order for the purposes of checking billing operations, detecting fraud, and

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[20] See *Labette County Comm'rs* v. *Moulton*, 112 U. S. 217, 221 (1884): "[I]t does not follow because the jurisdiction in mandamus [now included in § 1651] is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced."

[21] See 47 U. S. C. § 201 (a) and N. Y. Pub. Serv. Law § 91 (McKinney 1955 and Supp. 1977–1978).

preventing violations of law.[22] It also agreed to supply the FBI with all the information required to install its own pen registers. Nor was the District Court's order in any way burdensome. The order provided that the Company be fully reimbursed at prevailing rates, and compliance with it required minimal effort on the part of the Company and no disruption to its operations.

Finally, we note, as the Court of Appeals recognized, that without the Company's assistance there is no conceivable way in which the surveillance authorized by the District Court could have been successfully accomplished.[23] The FBI, after an exhaustive search, was unable to find a location where it could install its own pen registers without tipping off the targets of the investigation. The provision of a leased line by the Company was essential to the fulfillment of the purpose—to learn the identities of those connected with the gambling operation—for which the pen register order had been issued.[24]

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[22] Tr. of Oral Arg. 27–28, 40.

[23] The dissent's attempt to draw a distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties, *post*, at 189–190, is specious. Courts normally exercise their jurisdiction only in order to protect the legal rights of parties. In *Price* v. *Johnston*, 334 U. S. 266 (1948), for example, the production of the federal prisoner in court was required in order to enable him to effectively present his appeal which the court had jurisdiction to hear. Similarly, in *Harris* v. *Nelson*, 394 U. S. 286 (1969), discovery was ordered in connection with a habeas corpus proceeding for the purpose of enabling a prisoner adequately to protect his rights. Here, we have held that Fed. Rule Crim. Proc. 41 provided the District Court with power to authorize the FBI to install pen registers. The order issued by the District Court compelling the Company to provide technical assistance was required to prevent nullification of the court's warrant and the frustration of the Government's right under the warrant to conduct a pen register surveillance, just as the orders issued in *Price* and *Harris* were necessary to protect the rights of prisoners.

[24] We are unable to agree with the Company's assertion that "it is extraordinary to expect citizens to directly involve themselves in the law

The order compelling the Company to provide assistance was not only consistent with the Act but also with more recent congressional actions. As established in Part II, *supra*, Congress clearly intended to permit the use of pen registers by federal law enforcement officials. Without the assistance of the Company in circumstances such as those presented here, however, these devices simply cannot be effectively employed. Moreover, Congress provided in a 1970 amendment to Title III that "[a]n order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier . . . shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively . . . ." 18 U. S. C. § 2518 (4). In light of this direct

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enforcement process." Tr. of Oral Arg. 41. The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions, as the Company apparently believes. See *Babington* v. *Yellow Taxi Corp.*, 250 N. Y. 14, 17, 164 N. E. 726, 727 (1928) (Cardozo, C. J.) ("Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand"). See also *In re Quarles and Butler*, 158 U. S. 532, 535 (1895) ("It is the duty . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States"); *Hamilton* v. *Regents*, 293 U. S. 245, 265 n. (1934) (Cardozo, J., concurring); *Elrod* v. *Moss*, 278 F. 123, 129 (CA4 1921). The concept that citizens have a duty to assist in enforcement of the laws is at least in part the predicate of Fed. Rule Crim. Proc. 17, which clearly contemplates power in the district courts to issue subpoenas and subpoenas *duces tecum* to nonparty witnesses and to hold noncomplying, nonparty witnesses in contempt. Cf. *Roviaro* v. *United States*, 353 U. S. 53, 59 (1957) ("The [informer's] privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation"). Of course we do not address the question of whether and to what extent such a general duty may be legally enforced in the diverse contexts in which it may arise.

command to federal courts to compel, upon request, any assistance necessary to accomplish an electronic interception, it would be remarkable if Congress thought it beyond the power of the federal courts to exercise, where required, a discretionary authority to order telephone companies to assist in the installation and operation of pen registers, which accomplish a far lesser invasion of privacy.[25] We are convinced that

[25] We reject the Court of Appeals' suggestion that the fact that Congress amended Title III to require that communication common carriers provide necessary assistance in connection with electronic surveillance within the scope of Title III reveals a congressional "doubt that the courts possessed inherent power to issue such orders" and therefore "it seems reasonable to conclude that similar authorization should be required in connection with pen register orders . . . ." 538 F. 2d, at 962. The amendment was passed following the decision of the Ninth Circuit in *Application of United States*, 427 F. 2d 639 (1970), which held that absent specific statutory authority, a United States District Court was without power to compel a telephone company to assist in a wiretap conducted pursuant to Title III. The court refused to infer such authority in light of Congress' silence in a statute which constituted a "comprehensive legislative treatment" of wiretapping. *Id.*, at 643. We think that Congress' prompt action in amending the Act was not an acceptance of the Ninth Circuit's view but "more in the nature of an overruling of that opinion." *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d, at 813. The meager legislative history of the amendment indicates that Congress was only providing an unequivocal statement of its intent under Title III. See 115 Cong. Rec. 37192 (1969) (remarks of Sen. McClellan). We decline to infer from a congressional grant of authority under these circumstances that such authority was previously lacking. See *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 608–612 (1966); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47 (1950).

Moreover, even if Congress' action were viewed as indicating acceptance of the Ninth Circuit's view that there was no authority for the issuance of orders compelling telephone companies to provide assistance in connection with wiretaps without an explicit statutory provision, it would not follow that explicit congressional authorization was also needed to order telephone companies to assist in the installation and operation of pen registers which, unlike wiretaps, are not regulated by a comprehensive statutory scheme. In any event, by amending Title III Congress has now required that at the Government's request telephone companies be directed to provide

to prohibit the order challenged here would frustrate the clear indication by Congress that the pen register is a permissible law enforcement tool by enabling a public utility to thwart a judicial determination that its use is required to apprehend and prosecute successfully those employing the utility's facilities to conduct a criminal venture. The contrary judgment of the Court of Appeals is accordingly reversed.

So ordered.

MR. JUSTICE STEWART, concurring in part and dissenting in part.

I agree that the use of pen registers is not governed by the requirements of Title III and that the District Court had authority to issue the order authorizing installation of the pen register, and so join Parts I, II, and III of the Court's opinion. However, I agree with MR. JUSTICE STEVENS that the District Court lacked power to order the telephone company to assist the Government in installing the pen register, and thus join Part II of his dissenting opinion.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting in part.

Today's decision appears to present no radical departure from this Court's prior holdings. It builds upon previous intimations that a federal district court's power to issue a search warrant under Fed. Rule Crim. Proc. 41 is a flexible one, not strictly restrained by statutory authorization, and it applies the same flexible analysis to the All Writs Act, 28 U. S. C. § 1651 (a). But for one who thinks of federal courts as courts of limited jurisdiction, the Court's decision is difficult

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assistance in connection with wire interceptions. It is plainly unlikely that Congress intended at the same time to leave federal courts without authority to require assistance in connection with pen registers.

to accept. The principle of limited federal jurisdiction is fundamental; never is it more important than when a federal court purports to authorize and implement the secret invasion of an individual's privacy. Yet that principle was entirely ignored on March 19 and April 2, 1976, when the District Court granted the Government's application for permission to engage in surveillance by means of a pen register, and ordered the respondent to cooperate in the covert operation.

Congress has not given the federal district courts the power either to authorize the use of a pen register, or to require private parties to assist in carrying out such surveillance. Those defects cannot be remedied by a patchwork interpretation of Rule 41 which regards the Rule as applicable as a grant of authority, but inapplicable insofar as it limits the exercise of such authority. Nor can they be corrected by reading the All Writs Act as though it gave federal judges the wide-ranging powers of an ombudsman. The Court's decision may be motivated by a belief that Congress would, if the question were presented to it, authorize both the pen register order and the order directed to the Telephone Company.[1] But the history and consistent interpretation of the federal court's power to issue search warrants conclusively show that, in these areas, the Court's rush to achieve a logical result must await congressional deliberation. From the beginning of our Nation's history, we have sought to prevent the accretion of arbitrary police powers in the federal courts; that accretion is no less dangerous and unprecedented because the first step appears to be only minimally intrusive.

I

Beginning with the Act of July 31, 1789, 1 Stat. 29, 43, and concluding with the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 219, 238, Congress has enacted a

[1] In fact, Congress amended Title III when presented with a similar question. See *ante*, at 177–178, n. 25.

series of over 35 different statutes granting federal judges the power to issue search warrants of one form or another. These statutes have one characteristic in common: they are specific in their grants of authority and in their inclusion of limitations on either the places to be searched, the objects of the search, or the requirements for the issuance of a warrant.[2] This is not a random coincidence; it is a reflection of a concern deeply imbedded in our revolutionary history for the abuses that attend any broad delegation of power to issue search warrants. In the colonial period, the oppressive British practice of allowing courts to issue "general warrants" or "writs of assistance" [3] was one of the major catalysts of the struggle for independence.[4] After independence, one of the first state constitutions expressly provided that "no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws." [5] This same principle motivated the adoption of

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[2] The statutes enacted prior to 1945 are catalogued in the Appendix to Mr. Justice Frankfurter's eloquent dissent in *Davis* v. *United States*, 328 U. S. 582, 616–623.

[3] These writs authorized the indiscriminate search and seizure of undescribed persons or property based on mere suspicion. See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–55 (1937). The writs of assistance were viewed as particularly oppressive. They commanded "all officers and subjects of the Crown to assist in their execution," and they were not returnable after execution, but rather served as continuous authority during the lifetime of the reigning sovereign. *Id.*, at 53–54.

[4] The importance of the colonial resistance to general writs and writs of assistance in our history has been emphasized in several Supreme Court cases, *e. g.*, *Frank* v. *Maryland*, 359 U. S. 360, 363–365; *Henry* v. *United States*, 361 U. S. 98, 100–101; *Stanford* v. *Texas*, 379 U. S. 476, 481–485, and is set forth in detail in Lasson, *supra*, and Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921).

[5] Article XIV of the Massachusetts Constitution of 1780. The Fourth Amendment was patterned after this provision. See *Harris* v. *United States*, 331 U. S. 145, 158 (Frankfurter, J., dissenting).

the Fourth Amendment and the contemporaneous, specific legislation limiting judicial authority to issue search warrants.[6]

It is unnecessary to develop this historical and legislative background at any great length, for even the rough contours make it abundantly clear that federal judges were not intended to have any roving commission to issue search warrants. Quite properly, therefore, the Court today avoids the error committed by the Courts of Appeals which have held that a district court has "inherent power" to authorize the installation of a pen register on a private telephone line.[7] Federal courts have no such inherent power.[8]

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[6] It was not until 1917 that Congress granted the federal courts, as part of the Espionage Act, broad powers to issue search warrants. 40 Stat. 217, 228 (allowing warrants for stolen property, property used in the commission of a felony, and property used to unlawfully aid a foreign government). These provisions of the Espionage Act formed the basis of Rule 41. See Notes of Advisory Committee on Rules, 18 U. S. C. App., p. 4512. It is clear that the Espionage Act did not delegate authority to issue all warrants compatible with the Fourth Amendment. After the Act, Congress continued to enact legislation authorizing search warrants for particular items, and the courts recognized that, if a warrant was not specifically authorized by the Act—or another congressional enactment—it was prohibited. See *Colyer* v. *Skeffington*, 265 F. 17, 45 (Mass. 1920), rev'd on other grounds, 277 F. 129 (CA1 1922). See also *Warden* v. *Hayden*, 387 U. S. 294, 308 n. 12.

[7] See *United States* v. *Southwestern Bell Tel. Co.*, 546 F. 2d 243, 245 (CA8 1976); *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (CA7 1976) (*semble*).

[8] I recognize that there are opinions involving warrantless electronic surveillance which assume that courts have some sort of nonstatutory power to issue search warrants. See *United States* v. *Giordano*, 416 U. S. 505, 554 (POWELL, J., concurring); *Katz* v. *United States*, 389 U. S. 347; *Osborn* v. *United States*, 385 U. S. 323. That assumption was not, however, necessary to the decisions in any of those cases, and *Katz* may rest on a reading of Fed. Rule Crim. Proc. 41, see discussion, *infra*, at 184–185. Admittedly, *Osborn* appears to rely in part on a nonstatutory order to permit a secret recording of a conversation with a lawyer who attempted to bribe a witness. But, as the Court subsequently made clear in *United States* v. *White*, 401 U. S. 745, prior judicial authorization was not a necessary element of that case. Moreover, since the court in *Osborn* was

While the Court's decision eschews the notion of inherent power, its holding that Fed. Rule Crim. Proc. 41 authorizes the District Court's pen register order is equally at odds with the 200-year history of search warrants in this country and ignores the plain meaning and legislative history of the very Rule on which it relies. Under the Court's reading of the Rule, the definition of the term "property" in the Rule places no limits on the objects of a proper search and seizure, but is merely illustrative. *Ante,* at 169. The Court treats Rule 41 as though it were a general authorization for district courts to issue any warrants not otherwise prohibited. *Ante,* at 170. This is a startling approach. On its face, the Rule grants no such open-ended authority. Instead, it follows in the steps of the dozens of enactments that preceded it: It limits the nature of the property that may be seized and the circumstances under which a valid warrant may be obtained. The continuing force of these limitations is demonstrated by the congressional actions which compose the Omnibus Crime Control and Safe Streets Act of 1968.

In Title III of that Act, Congress legislated comprehensively on the subject of wiretapping and electronic surveillance. Specifically, Congress granted federal judges the power to authorize electronic surveillance under certain carefully defined circumstances. As the Court demonstrates in Part II of its opinion (which I join), the installation of pen register devices is not encompassed within that authority. What the majority opinion fails to point out, however, is that in Title IX of that same Act, Congress enacted another, distinct provision extending the power of federal judges to issue search

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concerned with the integrity of its own procedures, the argument that it possessed an inherent power to authorize a nonstatutory investigation had far greater strength than it has in the context of an ordinary criminal investigation. Cf. *American Tobacco Co.* v. *Werckmeister,* 146 F. 375 (CA2 1906), aff'd, 207 U. S. 284 (use of All Writs Act to seize goods in the support of the court's jurisdiction).

warrants. That statute, which formed the basis of the 1972 amendment to Rule 41, authorized the issuance of search warrants for an additional class of property, namely, "property that constitutes evidence of a criminal offense in violation of the laws of the United States." 18 U. S. C. § 3103a. In order to understand this provision, it must be remembered that, prior to 1967, "mere evidence" could not be the subject of a constitutionally valid seizure. *Gouled* v. *United States,* 255 U. S. 298. In *Warden* v. *Hayden,* 387 U. S. 294, this Court removed the constitutional objection to mere-evidence seizures. Title IX was considered necessary because, after *Warden* v. *Hayden,* there existed a category of property—mere evidence—which could be the subject of a valid seizure incident to an arrest, but which could not be seized pursuant to a warrant. The reason mere evidence could not be seized pursuant to a warrant was that, as Congress recognized, Rule 41 did not authorize warrants for evidence.[9] Title IX was enacted to fill this gap in the law.[10]

[9] In the edition of his treatise written after the decision in *Warden* v. *Hayden* in 1967 and prior to the 1972 amendment to Rule 41, Professor Wright acutely observed:

"Immediately after the Hayden decision there was an apparent anomaly, since the case held that evidence might be seized, but Rule 41 (b) did not authorize issuance of a search warrant for evidence. This would have meant that evidence might be seized where a search may permissibly be made without a warrant, but not in a search under warrant. This would have been wholly inconsistent with the strongly-held notion that, save in a few special classes of cases, a warrant should be a prerequisite to a search, and it would have encouraged police to search without a warrant. Congress, which can move more quickly than the rulemaking apparatus, responded by passage of a statute making it permissible to issue a search warrant for 'property that constitutes evidence of a criminal offense in violation of the laws of the United States.' This supplements, and may well soon swallow up, the other grounds for a search warrant set out in Rule 41 (b)." (Footnotes omitted.) 3 C. Wright, Federal Practice and Procedure § 664 (1969).

[10] See comments of Senator Allott, who introduced Title IX in the Senate, 114 Cong. Rec. 14790 (1968).

Two conclusions follow ineluctably from the congressional enactment of Title IX. First, Rule 41 was never intended to be a general authorization to issue any warrant not otherwise prohibited by the Fourth Amendment. If it had been, Congress would not have perceived a need to enact Title IX, since constitutional law, as it stood in 1968, did not prohibit the issuance of warrants for evidence.[11]

Second, the enactment of Title IX disproves the theory that the definition of "property" in Rule 41 (h) is only illustrative. This suggestion was first put forward by the Court in *Katz* v. *United States*, 389 U. S. 347. The issue was not briefed in *Katz*, but the Court, in dicta, indicated that Rule 41 was not confined to tangible property. Whatever the merits of that suggestion in 1967, it has absolutely no force at this time. In 1968 Congress comprehensively dealt with the issue of electronic searches in Title III. In the same Act, it provided authority for expanding the scope of property covered under Rule 41. But the definition of property in the Rule has never changed. Each item listed is tangible,[12] and the final reference to "and any other tangible items" surely must now be read as describing the outer limits of the included category.[13] It strains

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[11] Indeed, under the Court's flexible interpretation of Rule 41, the entire series of statutes that belie the "inherent power" concept, was also an exercise in futility because the silence of Congress would not have prohibited any warrant that did not violate the Fourth Amendment. Many of these statutes remain in effect, *e. g.*, 49 U. S. C. § 782 (seizure of certain contraband); 19 U. S. C. § 1595 (customs duties; searches and seizures); and Rule 41 (h) expressly provides that Rule 41 "does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants . . . ."

[12] Rule 41 (h) provides in part:

"The term 'property' is used in this rule to include documents, books, papers and any other tangible objects."

[13] The Court acknowledges that the amendment to Rule 41 (b) eliminated a "restriction" against the seizure of mere evidence. *Ante*, at 170–171, n. 18. What the Court refers to as a "restriction" was nothing more than silence—the absence of an express grant of authority. Since the

credulity to suggest that Congress, having carefully circumscribed the use of electronic surveillance in Title III, would then, in Title IX, expand judicial authority to issue warrants for the electronic seizure of "intangibles" without the safeguards of Title III.[14] In fact, the safeguards contained in Rule 41 make it absurd to suppose that its draftsmen thought they were authorizing any form of electronic surveillance. The paragraphs relating to issuance of the warrant, Rule 41 (c), the preparation of an inventory of property in the presence of the person whose property has been taken, Rule 41 (d), and the motion for a return of property, Rule 41 (e), are almost meaningless if read as relating to electronic surveillance of any kind.

To reach its result in this case, the Court has had to overlook

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Rule is just as silent on the subject of seizing intangibles as it was on the subject of seizing mere evidence, it is difficult to understand why the Court does not recognize the same "restriction" against such seizures.

[14] The Court argues that it "would be anomalous to permit the recording of conversations by means of electronic surveillance while prohibiting the far lesser intrusion accomplished by pen registers." *Ante,* at 170. But respondent does not claim that *Congress* has prohibited the use of pen registers. Admittedly there is now no statute either permitting or prohibiting the use of such devices. If that use is a "search" within the meaning of the Fourth Amendment—a question the Court does not decide—there is nothing anomalous about concluding that it is a forbidden activity until Congress has prescribed the safeguards that should accompany any warrant to engage in it. Even if an anomaly does exist, it should be cured by Congress rather than by a loose interpretation of "property" under Rule 41 which may tolerate sophisticated electronic surveillance techniques never considered by Congress and presenting far greater dangers of intrusion than pen registers. See *Michigan Bell Tel. Co.* v. *United States,* 565 F. 2d 385 (CA6 1977) (indicating the increasing sophistication of surveillance techniques similar to pen registers); cf. *United States* v. *Pretzinger,* 542 F. 2d 517 (CA9 1976) (use of electronic tracking devices). It is significant that Title III limits the types of criminal investigations for which electronic surveillance may be used; no such limit is expressed in Rule 41 or is implicit in the Court's reasoning today.

the Rule's specific language, its specific safeguards, and its legislative background. This is an extraordinary judicial effort in such a sensitive area, and I can only regard it as most unwise. It may be that a pen register is less intrusive than other forms of electronic surveillance. Congress evidently thought so. See S. Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968). But the Court should not try to leap from that assumption to the conclusion that the District Court's order here is covered by Rule 41. As I view this case, it is immaterial whether or not the attachment of a pen register to a private telephone line is a violation of the Fourth Amendment. If, on the one hand, the individual's privacy interest is not constitutionally protected, judicial intervention is both unnecessary and unauthorized. If, on the other hand, the constitutional protection is applicable, the focus of inquiry should not be whether Congress has prohibited the intrusion, but whether Congress has expressly authorized it, and no such authorization can be drawn from Rule 41. On either hypothesis, the order entered by the District Court on March 19, 1976, authorizing the installation of a pen register, was a nullity. It cannot, therefore, support the further order requiring the New York Telephone Company to aid in the installation of the device.

II

Even if I were to assume that the pen register order in this case was valid, I could not accept the Court's conclusion that the District Court had the power under the All Writs Act, 28 U. S. C. § 1651 (a), to require the New York Telephone Company to assist in its installation. This conclusion is unsupported by the history, the language, or previous judicial interpretations of the Act.

The All Writs Act was originally enacted, in part, as § 14 of the Judiciary Act of 1789, 1 Stat. 81.[15] The Act was, and

[15] The statute was also derived from § 13 of the Judiciary Act, which concerned writs of mandamus and prohibition, 1 Stat. 80, and a statute

is, necessary because federal courts are courts of limited jurisdiction having only those powers expressly granted by Congress,[16] and the statute provides these courts with the procedural tools—the various historic common-law writs—necessary for them to exercise their limited jurisdiction.[17] The statute does not contain, and has never before been interpreted as containing, the open-ended grant of authority to federal courts that today's decision purports to uncover. Instead, in the language of the statute itself, there are two fundamental limitations on its scope. The *purpose* of any order authorized by the Act must be to aid the court in the exercise of its jurisdiction; [18] and the *means* selected must be analogous to a common-law writ. The Court's opinion ignores both limitations.

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dealing with writs of *ne exeat*, 1 Stat. 334. The All Writs Act now reads:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[16] This proposition was so well settled by 1807 that Mr. Chief Justice Marshall needed no citation to support the following statement:

"As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

"Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied." *Ex parte Bollman*, 4 Cranch 75, 93.

[17] See *Harris* v. *Nelson*, 394 U. S. 286, 299.

[18] This Court has frequently considered this requirement in the context of orders necessary or appropriate in the exercise of appellate jurisdiction. See J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice ¶¶ 110.27–110.28 (1975). Here, we are faced with an order that must be necessary or appropriate in the exercise of a district court's original jurisdiction.

The Court starts from the premise that a district court may issue a writ under the Act "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Ante*, at 172. As stated, this premise is neither objectionable nor remarkable and conforms to the principle that the Act was intended to aid the court in the exercise of its jurisdiction. Clearly, if parties were free to ignore a court judgment or order, the court's ability to perform its duties would be undermined. And the court's power to issue an order requiring a party to carry out the terms of the original judgment is well settled. See *Root* v. *Woolworth*, 150 U. S. 401, 410–413. The courts have also recognized, however, that this power is subject to certain restraints. For instance, the relief granted by the writ may not be "of a different kind" or "on a different principle" from that accorded by the underlying order or judgment. See *id.*, at 411–412.[19]

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[19] These restraints are necessary concomitants of the undisputed fact that the All Writs Act does not provide federal courts with an independent grant of jurisdiction. *McIntire* v. *Wood*, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U. S. 450. The factors mentioned above may be relevant in determining whether the court has ancillary jurisdiction over the dispute. See *Dugas* v. *American Surety Co.*, 300 U. S. 414; *Labette County Commr's* v. *Moulton*, 112 U. S. 217; *Morrow* v. *District of Columbia*, 135 U. S. App. D. C. 160, 417 F. 2d 728 (1969). In this case, the District Court's order was entered against a third party—the Telephone Company. The Court never explains on what basis the District Court had jurisdiction to enter this order. Possibly, the District Court believed that it had ancillary jurisdiction over the controversy, or that the failure of the Company to aid the Government posed a federal question under 28 U. S. C. § 1331. See *Board of Education* v. *York*, 429 F. 2d 66 (CA10 1970), cert. denied, 401 U. S. 954. Since I believe that the District Court could not enter its order in any event since it was not in aid of its jurisdiction, I do not find it necessary to reach the question whether there was jurisdiction, apart from the All Writs Act, over the "dispute" between the Government and the Telephone Company. However, the Court's failure to indicate the basis of jurisdiction is inexplicable.

More significantly, the courts have consistently recognized and applied the limitation that whatever action the court takes must be in aid of *its* duties and *its* jurisdiction.[20] The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute cannot be, a sufficient basis for issuance of the writ. See *Sampson* v. *Murray*, 415 U. S. 61; *Commercial Security Bank* v. *Walker Bank & Trust Co.*, 456 F. 2d 1352 (CA10, 1972); J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice ¶ 110.29 (1975).

Nowhere in the Court's decision or in the decisions of the lower courts is there the slightest indication of why a writ is necessary or appropriate in this case to aid the District Court's jurisdiction. According to the Court, the writ is necessary because the Company's refusal "threatened obstruc-

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[20] The Court's failure to explain why the District Court's order was in aid of its jurisdiction is particularly notable when compared to the rationale of the prior Court cases on which it relies. See, *e. g.*, *Harris* v. *Nelson*, 394 U. S. 286, 299 ("the habeas corpus *jurisdiction and the duty to exercise it* being present, the courts may fashion appropriate modes of procedure . . . . *Where their duties require it*, this is the inescapable obligation of the courts") (emphasis added); *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 604 (injunction issued under All Writs Act upheld because it was necessary "to preserve the *status quo* while administrative proceedings are in progress and *prevent impairment of the effective exercise of appellate jurisdiction*") (emphasis added).

The Court apparently concludes that there is no functional distinction between orders designed to enable a party to effectuate its rights and orders necessary to aid a court in the exercise of its jurisdiction. *Ante*, at 175 n. 23. The Court reaches this conclusion by pointing out that the orders in cases such as *Harris* v. *Nelson*, *supra*, protected a party's rights. This is, of course, true. Orders in aid of a court's jurisdiction will usually be beneficial to one of the parties before the court. The converse, however, is clearly not true. Not all orders that may enable a party to effectuate its rights aid the court in its exercise of jurisdiction. Compare *Sampson* v. *Murray*, 415 U. S. 61, with *FTC* v. *Dean Foods Co.*, *supra*.

tion of an investigation . . . ." *Ante,* at 174. Concededly, citizen cooperation is always a desired element in any government investigation, and lack of cooperation may thwart such an investigation, even though it is legitimate and judicially sanctioned.[21] But unless the Court is of the opinion that the District Court's interest in its jurisdiction was coextensive with the Government's interest in a successful investigation, there is simply no basis for concluding that the inability of the Government to achieve the purposes for which it obtained the pen register order in any way detracted from or threatened the District Court's jurisdiction. Plainly, the District Court's jurisdiction does not ride on the Government's shoulders until successful completion of an electronic surveillance.

If the All Writs Act confers authority to order persons to aid the Government in the performance of its duties, and is no longer to be confined to orders which must be entered to enable the court to carry out its functions, it provides a sweeping grant of authority entirely without precedent in our Nation's history. Of course, there is precedent for such authority in the common law—the writ of assistance. The use of that writ by the judges appointed by King George III was one British practice that the Revolution was specifically intended to terminate. See n. 3, *supra.* I can understand why the Court today does not seek to support its holding by reference to that writ, but I cannot understand its disregard of the statutory requirement that the writ be "agreeable to the usages and principles of law."

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[21] A citizen is not, however, free to forcibly prevent the execution of a search warrant. Title 18 U. S. C. § 2231 imposes criminal penalties on any person who "forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants . . . ." This section was originally enacted as part of the Espionage Act of 1917, see n. 6, *supra,* and is the only statutory provision imposing any duty on the general citizenry to "assist" in the execution of a warrant.

III

The order directed against the Company in this case is not particularly offensive. Indeed, the Company probably welcomes its defeat since it will make a normal profit out of compliance with orders of this kind in the future. Nevertheless, the order is deeply troubling as a portent of the powers that future courts may find lurking in the arcane language of Rule 41 and the All Writs Act.

I would affirm the judgment of the Court of Appeals.

UNITED AIR LINES, INC. *v.* McMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76–906. Argued October 4, 1977—Decided December 12, 1977

The Age Discrimination in Employment Act of 1967, which applies to persons between the ages of 40 and 65, makes it unlawful for an employer to discharge any individual or otherwise discriminate against him with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. The Act specifies, however, in § 4 (f) (2) that it shall not be unlawful for an employer to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan that is not a "subterfuge" to evade the Act's purposes. Petitioner inaugurated a retirement income plan in 1941, which respondent employee voluntarily joined in 1964 after he had signed an application form that showed the normal retirement age for participants in his category as 60 years. After respondent was retired upon reaching that age he brought this suit under the Act, contending that his retirement was solely because of his age and violated the Act. The District Court granted a motion for summary judgment filed by petitioner, which had contended that respondent was retired in compliance with a bona fide retirement plan that he had voluntarily joined. The Court of Appeals reversed. Though it had been conceded that petitioner's plan was bona fide "in the sense that it exists and pays benefits," the court ruled that a pre-age-65 retirement is a "subterfuge" within the meaning of § 4 (f) (2) unless the employer can show that the "early retirement provision . . . has some economic or business purpose other than arbitrary age discrimination." *Held:* Petitioner's retirement plan comes within the § 4 (f) (2) exception, in the context of which "subterfuge" must be given its ordinary meaning as a scheme or stratagem to avoid the application of the Act. There is nothing to suggest that Congress intended to invalidate plans that were instituted in good faith before the Act's passage or that it intended to require employers to show a business or economic purpose to justify bona fide plans that antedated enactment of the statute. Pp. 195–203.

542 F. 2d 217, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., *post*, p. 204,

and WHITE, J., *post*, p. 204, filed opinions concurring in the judgment. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 208.

Arnold T. Aikens argued the cause for petitioner. With him on the briefs were *Kenneth A. Knutson, Earl G. Dolan,* and *Philip J. Hogan.*

Francis G. McBride argued the cause and filed a brief for respondent.*

MR. CHIEF JUSTICE BURGER, delivered the opinion of the Court.

The question presented in this case is whether, under the Age Discrimination in Employment Act of 1967, retirement of an employee over his objection and prior to reaching age 65 is permissible under the provisions of a bona fide retirement plan established by the employer in 1941 and joined by the employee in 1964. We granted certiorari to resolve a conflict between the holdings of the Fifth Circuit in *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (1974), and the Fourth Circuit now before us. See *Zinger* v. *Blanchette*, 549 F. 2d 901 (CA3 1977), cert. pending, No. 76–1375.

I

The operative facts were stipulated by the parties in the District Court and are not controverted here. McMann joined United Air Lines, Inc., in 1944, and continued as an employee until his retirement at age 60 in 1973. Over the years he held various positions with United and at retirement held that of technical specialist-aircraft systems. At the time

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**Morgan D. Hodgson, Lawrence B. Kraus,* and *Richard O'Brecht* filed a brief for the Chamber of Commerce of the United States of America as *amicus curiae* urging reversal.

Cyril F. Brickfield, Jonathan A. Weiss, and *Robert B. Gillan* filed a brief for the National Retired Teachers Assn. et al. as *amici curiae* urging affirmance.

McMann was first employed, United maintained a formal retirement income plan it had inaugurated in 1941, in which McMann was eligible to participate, but was not compelled to join.[1] He voluntarily joined the plan in January 1964. The application form McMann signed showed the normal retirement age for participants in his category as 60 years.

McMann reached his 60th birthday on January 23, 1973, and was retired on February 1, 1973, over his objection. He then filed a notice of intent to sue United for violation of the Act pursuant to 29 U. S. C. § 626 (d). Although he received an opinion from the Department of Labor that United's plan was bona fide and did not appear to be a subterfuge to evade the purposes of the Act, he brought this suit.

McMann's suit in the District Court seeking injunctive relief, reinstatement, and backpay alleged his forced retirement was solely because of his age and was unlawful under the Act. United's response was that McMann was retired in compliance with the provisions of a bona fide retirement plan which he had voluntarily joined. On facts as stipulated, the District Court granted United's motion for summary judgment.

In the Court of Appeals it was conceded the plan was bona fide "in the sense that it exists and pays benefits." [2] But McMann, supported by a brief *amicus curiae* filed in that court by the Secretary of Labor, contended the enforcement of the age-60 retirement provision, even under a bona fide plan instituted in good faith in 1941, was a subterfuge to evade the Act.[3]

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[1] The plan paid retirement benefits pursuant to a group annuity contract between United and two life insurance companies.

[2] The same concession was made in this Court.

[3] No brief *amicus* was filed on behalf of the Department of Labor in this Court, but after submission of the case following oral argument the Solicitor General wrote a letter to the Clerk of this Court stating that the Government agreed with the Fourth Circuit and was prepared to file a brief *amicus* within three weeks. The Rules of this Court do not allow the

The Court of Appeals agreed, holding that a pre-age-65 retirement falls within the meaning of "subterfuge" unless the employer can show that the "early retirement provision . . . ha[s] some economic or business purpose other than arbitrary age discrimination." 542 F. 2d 217, 221 (1976). The Court of Appeals remanded the case to the District Court to allow United an opportunity to show an economic or business purpose and United sought review here.

We reverse.

II

Section 2 (b) of the Age Discrimination in Employment Act of 1967, 81 Stat. 602, recites that its purpose is

> "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621 (b).

Section 4 (a)(1) of the Act, 81 Stat. 603, makes it unlawful for an employer

> "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U. S. C. § 623 (a)(1).

The Act covers individuals between ages 40 and 65, 29 U. S. C. § 631, but does not prohibit all forced retirements prior to age 65; some are permitted under § 4 (f)(2), 81 Stat. 603, which provides:

> "It shall not be unlawful for an employer . . . or labor organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a

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filing of briefs *amicus* after oral argument. See Rule 42. No motion for leave to file a brief *amicus* was filed.

> subterfuge to evade the purposes of this [Act], except that no such employee benefit plan shall excuse the failure to hire any individual . . . ." 29 U. S. C. § 623 (f)(2).

See *infra*, at 198–202.

McMann argues the term "normal retirement age" is not defined in the plan other than in a provision that "A Participant's Normal Retirement Date is the first day of the month following his 60th birthday." From this he contends normal retirement age does not mean mandatory or compelled retirement at age 60, and United therefore did not retire him "to observe the terms" of the plan as required by § 4 (f)(2). As to this claim, however, we accept the analysis of the plan by the Court of Appeals for the Fourth Circuit:

> "While the meaning of the word 'normal' in this context is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the 'normal' retirement age. United legally may retain employees such as McMann past age 60, but has never done so: its policy has been to retire all employees at the 'normal' age. Given these facts, we conclude that *for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer.*" 542 F. 2d, at 219. (Emphasis supplied.)

McMann had filed a grievance challenging his retirement since, as a former pilot, he held a position on the pilots' seniority roster. In that arbitration proceeding he urged that "normal" means "average" and so long as a participant is in good health and fit for duty he should be retained past age 60. The ruling in the arbitration proceeding was that " '[n]ormal' means regular or standard, not average, not only as a matter of linguistics but also in the general context of retirement and pension plans and the settled practice at

United." It was also ruled that the involuntary retirement of McMann "was taken in accordance with an established practice uniformly applied to all members of the bargaining unit."

Though the District Court made no separate finding as to the meaning of "normal" in this context, it had before it the definition ascribed in the arbitration proceeding and that award was incorporated by reference in the court's findings and conclusions. In light of the facts stipulated by the parties and found by the District Court, we also accept the Court of Appeals' view as to the meaning of "normal." [4]

In *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d, at 215, the Fifth Circuit held that establishment of a bona fide retirement plan long before enactment of the Act, "eliminat[ed] any notion that it was adopted as a subterfuge for evasion." [5] In

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[4] We note, too, that the Department of Labor's interpretation of § 4 (f) (2), issued nearly contemporaneously with the effective date of the Act, was that the meaning did not turn on whether or not all employees under a plan are required to retire at the same age.

"The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid, insofar as the exception provided in Section 4 (f) (2) is concerned." 29 CFR § 860.110 (a) (1976).

The Department's more recent position on the section is that pre-65 retirements "are unlawful unless the mandatory retirement provision . . . is required by the terms of the plan and is not optional . . . ." U. S. Department of Labor, Annual Report on Age Discrimination in Employment Act of 1967, p. 17 (1975). Having concluded, as did the Court of Appeals, that the United plan calls for mandatory retirement at age 60, however, we need not consider this further.

[5] Similarly, in *De Loraine* v. *MEBA Pension Trust*, 499 F. 2d 49 (CA2), cert. denied, 419 U. S. 1009 (1974), the court said a bona fide pension plan established in 1955 was not a subterfuge. That case did not properly present the question of whether the Act forbade involuntary retirement before age 65 and the court did not purport to decide it. 499 F. 2d, at 51 n. 7. *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945, 948 (CD Cal. 1974), aff'd, No. 74–2604 (CA9, Oct. 15, 1975),

rejecting the *Taft* reasoning, the Fourth Circuit emphasized that it distinguished between the Act and the *purposes* of the Act. The distinction relied on is untenable because the Act is the vehicle by which its purposes are expressed and carried out; it is difficult to conceive of a subterfuge to evade the one which does not also evade the other.

McMann argues that § 4 (f)(2) was not intended to authorize involuntary retirement before age 65, but was only intended to make it economically feasible for employers to hire older employees by permitting the employers to give such older employees lesser retirement and other benefits than provided for younger employees. We are persuaded that the language of § 4 (f)(2) was not intended to have such a limited effect.

In *Zinger* v. *Blanchette*, 549 F. 2d 901 (1977), the Third Circuit had before it both the *Taft* and *McMann* decisions. It accepted *McMann*'s distinction between the Act and its purposes, which, in this setting, we do not, but nevertheless concluded:

> "The primary purpose of the Act is to prevent age discrimination in *hiring* and *discharging* workers. There is, however, a clear, measurable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. A careful examination of the legislative history demonstrates that, while cognizant of the disruptive effect retirement may have on individuals, Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge." 549 F. 2d, at 905. (Emphasis supplied; footnote omitted.)

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likewise rejected the idea that a pension plan established long before the Act could be a subterfuge saying: "Obviously it could not have been evolved in an attempt to circumvent any public policy or law."

The dissent relies heavily upon the legislative history, which by traditional canons of interpretation is irrevelant to an unambiguous statute. However, in view of the recourse to the legislative history we turn to that aspect to demonstrate the absence of any indication of congressional intent to undermine the countless bona fide retirement plans existing in 1967 when the Act was passed. Such a pervasive impact on bona fide existing plans should not be read into the Act without a clear, unambiguous expression in the statute.

When the Senate Subcommittee was considering the bill, the then Secretary of Labor, Willard Wirtz, was asked what effect the Act would have on existing pension plans. His response was:

> "It would be my judgment . . . that the effect of the provision in 4 (f)(2) [of the original bill] . . . is to protect the application of almost all plans which I know anything about. . . . It is intended to protect retirement plans." Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 53 (1967) (hereafter Senate Hearings).[6]

When the present language of § 4 (f)(2) was later proposed by amendments, Mr. Wirtz again commented that established pension plans would be protected. Hearings on H. R. 4221 et al. before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., 40 (1967).

Senator Javits' concern with the administration version of § 4 (f)(2), expressed in 1967 when the legislation was being debated, was that it did not appear to give employers flexibility

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[6] Section 4 (f)(2) of the original administration bill provided: "It shall not be unlawful for an employer . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act . . . ."

to hire older employees without incurring extraordinary expenses because of their inclusion in existing retirement plans. His concern was not, as inferred by the dissent, that involuntary retirement programs would still be allowed. He said,

> "The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters.
>
> "That flexibility is what we recommend.
>
> "We also recommend that the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment." Senate Hearings 27.[7]

In keeping with this objective Senator Javits proposed the amendment, which was incorporated into the 1967 Act, calling for "a fairly broad exemption . . . for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.*, at 28.

The true intent behind § 4 (f)(2) was not lost on the representatives of organized labor; they viewed it as protecting

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[7] Legislative observations 10 years after passage of the Act are in no sense part of the legislative history. See *post*, at 218.

an employer's right to require pre-65 retirement pursuant to a bona fide retirement plan and objected to it on that basis. The legislative director for the AFL–CIO testified:

> "We likewise do not see any reason why the legislation should, as is provided in section 4 (f)(2) of the Administration bill, permit involuntary retirement of employees under 65. . . . Involuntary retirement could be forced, regardless of the age of the employee, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act." Senate Hearings 96.

In order to protect workers against involuntary retirement, the AFL–CIO suggested an "Amendment to Eliminate Provision Permitting Involuntary Retirement From the Age Discrimination in Employment Act, and to Substitute Therefor Provision Safeguarding Bona Fide Seniority or Merit Systems," which would have deleted any reference to retirement plans in the exception. *Id.*, at 100. This amendment was rejected.

But, as noted in *Zinger*, 549 F. 2d, at 907, the exemption of benefit plans remained in the bill as enacted notwithstanding labor's objection, and the labor-proposed exemption for seniority systems was added. There is no basis to view the final version of § 4 (f)(2) as an acceptance of labor's request that the benefit-plan provision be deleted; the plain language of the statute shows it is still there, albeit in different terms.

Also added to the section when it emerged from the Senate Subcommittee is the language "except that no such employee benefit plan shall excuse the failure to hire any individual." Rather than reading this addendum as a redundancy, as does the dissent, *post*, at 212, and n. 5, it is clear this is the result of Senator Javits' concern that observance of existing retirement plan terms might discourage hiring of older workers. *Supra*, at 200. Giving meaning to each of these provisions leads in-

escapably to the conclusion they were intended to permit observance of the mandatory retirement terms of bona fide retirement plans, but that the existence of such plans could not be used as an excuse not to hire any person because of age.

There is no reason to doubt that Secretary Wirtz fully appreciated the difference between the administration and Senate bills. He was aware of Senator Javits' concerns, and knew the Senator sought to amend the original bill to focus on the *hiring* of older persons notwithstanding the existence of pension plans which they might not economically be permitted to join. See Senate Hearings 40. Senator Javits' view was enacted into law making it possible to employ such older persons without compulsion to include them in pre-existing plans.

The dissent misconceives what was said in the Senate debate. The dialogue between Senators Javits and Yarborough, the minority and majority managers of the bill, respectively, is set out below [8] and clearly shows awareness of the continued vitality of pre-age-65 retirements.

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[8] "Mr. YARBOROUGH. I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan.

"Mr. JAVITS. I thank my colleague. That is important to business people." 113 Cong. Rec. 31255 (1967).

III

In this case, of course, our function is narrowly confined to discerning the meaning of the statutory language; we do not pass on the wisdom of fixed mandatory retirements at a particular age. So limited, we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans as the Fourth Circuit concluded. In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense. So read, a plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later. To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer. We reject any such *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act.[9]

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[9] Reference is made by the dissent, *post*, at 219 n. 13, to a recital on § 4 (f) (2) in the House Report. The House Report states:

"[Section 4 (f) (2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. *This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans.* The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings." H. R. Rep. No. 805, 90th Cong., 1st Sess., 4 (1967). (Emphasis supplied.)

The italicized portion shows quite clearly that the primary purpose of the bill was the hiring of older workers. A quite different question would be presented if a pre-existing bona fide plan were used as a reason for refusing to *hire* an older applicant for employment.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring in the judgment.

The Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.*, forbids any employer to discharge or otherwise discriminate against any employee between the ages of 40 and 65 because of his age. 29 U. S. C. § 623 (a)(1). But the Act also expressly provides that it is not unlawful for an employer to observe the terms of a bona fide employee benefit plan, such as a retirement plan, so long as the plan is not a "subterfuge to evade the purposes" of the Act. § 623 (f)(2).

It is conceded that United's retirement plan is bona fide. The only issue, then, is whether it is a "subterfuge to evade the purposes" of the Act. I think it is simply not possible for a bona fide retirement plan adopted long before the Act was even contemplated to be a "subterfuge" to "evade" either its terms or its purposes.

Since § 623 (f)(2) on its face makes United's action under the retirement plan lawful, it is unnecessary to address any of the other questions discussed in the Court's opinion or by MR. JUSTICE WHITE.

MR. JUSTICE WHITE, concurring in the judgment.

I

While I agree with the Court and with MR. JUSTICE STEWART that McMann's forced retirement at age 60 pursuant to United's retirement income plan does not violate the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.*, I disagree with the proposition that this bona fide plan necessarily is made lawful under § 4 (f)(2) of the Act, 29

U. S. C. § 623 (f)(2), merely because it was adopted long before the Act's passage. Even conceding that the retirement plan could not have been a subterfuge to evade the purposes of the Act when it was adopted by United in 1941, I believe that the decision by United to continue the mandatory aspects of the plan after the Act became effective in 1968 must be separately examined to determine whether it is proscribed by the Act.

The legislative history indicates that the exception contained within § 4 (f)(2) "applies to new and *existing* employee benefit plans, and to both the establishment and *maintenance* of such plans." H. R. Rep. No. 805, 90th Cong., 1st Sess., 4 (1967) (emphasis supplied); S. Rep. No. 723, 90th Cong., 1st Sess., 4 (1967) (emphasis supplied). This statement in both the House and Senate Reports demonstrates that there is no magic in the fact that United's retirement plan was adopted prior to the Act, for not only the plan's establishment but also its maintenance must be scrutinized. For that reason, unless United was legally bound to continue the mandatory retirement aspect of its plan, its decision to continue to require employees to retire at age 60 after the Act became effective must be viewed in the same light as a post-Act decision to adopt such a plan.

No one has suggested in this case that United did not have the legal option of altering its plan to allow employees who desired to continue working beyond age 60 to do so; at the most it has been concluded that United simply elected to apply its retirement policy uniformly. See *ante*, at 196. Because United chose to continue its mandatory retirement policy beyond the effective date of the Act, I would not terminate the inquiry with the observation that the plan was adopted long before Congress considered the age discrimination Act but rather would proceed to what I consider to be the crucial question: Does the Act prohibit the mandatory retirement pursuant to a bona fide retirement plan of an employee before

he reaches age 65? My reading of the legislative history, set out in Part II of the Court's opinion, convinces me that it does not.

II

As the opinion of the Court demonstrates, Congress in passing the Act did not intend to make involuntary retirements unlawful. In recommending the legislation to Congress, President Johnson specifically suggested an exception for those "special situations . . . where the employee is separated under a regular retirement system." 113 Cong. Rec. 1089–1090 (1967).[1] Pursuant to this recommendation, the House and Senate bills that were referred to committee expressly excepted involuntary retirements from the Act's prohibition,[2] an exception which, with only slight changes, remained in the final version enacted by Congress. As the Court correctly concludes, the changes that were made in § 4 (f)(2) were intended, not to eliminate the protection for retirement plans, but rather to meet the additional concern expressed by Senator Javits concerning the applicability of retirement plans to older workers who are hired. While the discussion in Congress concerning the language change was not extensive, it indicated that the change was intended to broaden the exception for retirement plans. I thus find unacceptable the dissent's view that Congress acceded to labor's suggestion that the protection for involuntary retirement be eliminated.

III

In this case, the Fourth Circuit recognized the fact that United's retirement plan is "bona fide" in the sense that it

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[1] Other exceptions recommended by the President, which were included within the final version of the Act, covered "special situations where age is a reasonable occupational qualification, [and] where an employee is discharged for good cause . . . ." 113 Cong. Rec. 1089–1090 (1967).

[2] S. 830, 90th Cong., 1st Sess. (1967); H. R. 4221, 90th Cong., 1st Sess. (1967).

provides McMann with substantial benefits. The court, however, viewed as separate and additional the requirement that the plan not be a subterfuge to evade the purposes of the Act. I find no support in the legislative history for the interpretation of that language as requiring "some economic or business purpose." 542 F. 2d 217, 221 (CA4 1976). Rather, as I read the history, Congress intended to exempt from the Act's prohibition all retirement plans—even those whose only purpose is to terminate the services of older workers—as long as the benefits they pay are not so unreasonably small as to make the "retirements" nothing short of discharges.

What little discussion there was in Congress concerning the meaning of the § 4 (f)(2) exception indicates that the no-subterfuge requirement was merely a restatement of the requirement that the plan be bona fide. See 113 Cong. Rec. 31255 (1967). It is significant that the subterfuge language was contained in the original administration bill, for that version was recognized as being "intended to protect retirement plans." See *ante*, at 199. Because all retirement plans necessarily make distinctions based on age, I fail to see how the subterfuge language, which was included in the original version of the bill and was carried all the way through, could have been intended to impose a requirement which almost no retirement plan could meet. For that reason I would interpret the § 4 (f)(2) exception as protecting actions taken pursuant to a retirement plan which is designed to pay substantial benefits.

Because the Court relies exclusively upon the adoption date of United's retirement plan as a basis for concluding that McMann's forced retirement was not unlawful, I cannot join its opinion. Instead, I would adopt the approach taken by the Third Circuit in *Zinger* v. *Blanchette*, 549 F. 2d 901 (1977), cert. pending, No. 76–1375, and would hold that his retirement was valid under the Act, not because the retirement plan was adopted by United prior to the Act's passage, but because the

Act does not prohibit involuntary retirements pursuant to bona fide plans.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today the Court, in its first encounter with the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U. S. C. § 621 *et seq.*, sharply limits the reach of that important law. In apparent disregard of settled principles of statutory construction, it gives an unduly narrow interpretation to a congressional enactment designed to remedy arbitrary discrimination in the workplace. Because I believe that the Court misinterprets the Act, I respectfully dissent.

But for § 4 (f)(2) of the Act, 29 U. S. C. § 623 (f)(2), petitioner's decision to discharge respondent because he reached the age of 60 would violate § 4 (a)(1), 29 U. S. C. § 623 (a)(1). This latter section makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual [between 40 and 65] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

The language used in § 4 (a)(1) tracks the language of § 703 (a)(1) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2 (a)(1).[1] This section has been interpreted as forbidding involuntary retirement when improper criteria, such as race or sex, are used in selecting those to be retired. With reference to the statutory language, courts have reasoned that forced retirement is "tantamount to a discharge," *Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d 1186, 1189 (CA7), cert. denied, 404 U. S. 939 (1971), or that the employer requiring

[1] Section 703 (a)(1) provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

retirement is "discriminat[ing] against" the retired employee "with respect to . . . [a] condition . . . of employment," see *Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d 490, 492 n. 3 (CA5), cert. denied, 414 U. S. 1002 (1973); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F. 2d 90, 94–95 (CA3 1973); *Bartmess* v. *Drewrys U. S. A., Inc., supra*, at 1188–1189.[2]

Given these constructions of § 703 (a)(1) of the Civil Rights Act and the absence of any indication that Congress intended § 4 (a)(1) of the Age Discrimination in Employment Act to be interpreted differently, I would construe the identical language of the two statutes in an identical manner. The question that remains is whether § 4 (f)(2) sanctions this otherwise unlawful act. That section provides:

> "It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act] . . . ."

The opinion of the Court assumes that this language is clear on its face. *Ante*, at 199. I cannot agree with this premise. In my view, the statutory language is susceptible of at least two interpretations, and the only reading consonant with congressional intent would preclude involuntary retirement of employees covered by the Act.

On this latter reading, § 4 (f)(2) allows different treatment of older employees only with respect to the benefits paid or available under certain employee benefit plans, including pen-

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[2] Courts have also suggested that involuntary retirement of an employee on a discriminatory basis might violate § 703 (a)(2) of the Civil Rights Act of 1964, which proscribes classification by an employer of an employee in a way which would "adversely affect his status as an employee," 42 U. S. C. § 2000e–2 (a)(2). *Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d, at 1189; *Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d, at 495. Section 4 (a)(2) of the Age Discrimination in Employment Act, 29 U. S. C. § 623 (a)(2), includes an identical prohibition.

sion and retirement plans.[3] Alternatively, the section may be read, as the Court has read it, also to permit involuntary retirement of older employees prior to age 65 pursuant to a pension or retirement benefit plan. *Ante*, at 198. The critical question, then, is whether the phrase "employee benefit plan," as used by Congress here to include a "retirement, pension or insurance plan," encompasses only the rules defining what benefits retirees receive, or whether it also encompasses rules mandating retirement at a particular age.

We need not decide on a strictly grammatical basis which reading is preferable. We are judges, not linguists, and our task is to divine congressional intent, using all available evidence. "[W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination."'" *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), quoting *United States* v. *American Trucking Assns.*, 310 U. S. 534, 544 (1940). See *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 10 (1976).

The Court's analysis of the legislative history establishes that the primary purpose of the Act was to facilitate the

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[3] This reading is illustrated by Senator Yarborough's example of the effect of § 4 (f) (2):

"Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." 113 Cong. Rec. 31255 (1967).

hiring of older workers. I have no quarrel with that proposition. Understanding this primary purpose, however, aids not at all in determining whether Congress also intended to prohibit forced retirement of those already employed. The Court's analysis of the legislative history on this issue, *ante*, at 199–202, on which MR. JUSTICE WHITE relies, *ante*, at 206, is unpersuasive, since it relies primarily on references to an exception that was not enacted.

There can be no question, that had Congress enacted § 4 (f)(2) in the form in which it was proposed by the administration, forced retirement would be permissible. That section of the initial bill quite specifically allowed such retirement. It provided:

> "It shall not be unlawful for an employer . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act . . . ." S. 830 and H. R. 4221, § 4 (f)(2), 90th Cong., 1st Sess. (1967).

Thus the remarks of Secretary Wirtz, Senator Javits, and the representative of the AFL–CIO on which the Court relies, see *ante*, at 199–201, quite properly reflect that the bill as it then existed would have authorized involuntary retirement. But the present benefit-plan exception to the § 4 (a) prohibition on age discrimination differs significantly from that contained in the original bill. The specific authorization for involuntary retirement was deleted. That this deletion was made may of itself suggest that Congress concluded such an exception was unwise; a review of the legislative history strongly supports this view.

Two sets of objections were made to the bill during the Senate and House hearings.[4] Many persons, including mem-

[4] Hearings on S. 830 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967) (hereafter Senate Hearings); Hearings on H. R. 4221 et al. before

bers of the Committees, expressed concern that the bill did "not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters." Statement of Sen. Javits, Senate Hearings 27; see also, *e. g.*, House Hearings 62–63 (statement of Labor Counsel, Chamber of Commerce of the United States). Representatives of organized labor voiced totally different objections to the initial version of § 4 (f)(2); they argued against permitting any involuntary retirement based on age for those within the coverage of the bill, whether or not pursuant to a bona fide plan. Senate Hearings 98; House Hearings 413. In addition, they suggested that bona fide seniority systems should receive express protection under § 4 (f).

After the hearings, the House and Senate Committees changed the exemption section to its present form. By adding to § 4 (f)(2) a provision permitting observance of bona fide seniority systems, Congress acceded to organized labor's concern that seniority systems not be abrogated. The addition of language permitting observance of the terms of a benefit plan was plainly responsive to the numerous criticisms that the bill would deter employment of older workers.[5] But the third change that was made—the deletion of the specific language permitting involuntary retirement—was not responsive to either of those criticisms, since deletion of that language could have no effect on the hiring of older workers or on seniority systems. A reasonable inference to be drawn from the dele-

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the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. (1967) (hereafter House Hearings).

[5] The Committees' concern that the Act not deter employers from hiring older employees is also reflected in the amendment to the section providing that "no such employee benefit plan shall excuse the failure to hire any individual." § 4 (f)(2), 29 U. S. C. § 623 (f)(2).

tion, therefore, is that Congress was responding to labor's other objection by removing the authorization for involuntary retirement from the exceptions to the statute's prohibitions. While, as the Court notes, *ante*, at 201, the specific language proposed by labor was not adopted, the Court offers no alternative explanation for the deletion of the explicit authorization for involuntary retirement.[6]

In contrast to the hearings on the original version of the § 4 (f)(2) exception, where there are repeated references to the fact that the bill permitted involuntary retirement, there are no similar statements in the Committee Reports or in the House and Senate debates with respect to the amended version of § 4 (f)(2). For example, the House and Senate Committee Reports explain the purpose and effect of § 4 (f)(2) as follows:

> "This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings." H. R. Rep. No. 805, 90th Cong., 1st Sess., 4 (1967).

See S. Rep. No. 723, 90th Cong., 1st Sess., 4 (1967).[7] Nowhere did the Committees suggest that the exemption per-

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[6] The Committees were certainly aware that Congress could retain the provision specifically authorizing involuntary retirement and add to it a provision permitting variation in the coverage of insurance and benefit plans. Many of the state statutes at which the Committees looked employed that approach. Senate Hearings 298–315; House Hearings 501–518 (*e. g.*, Connecticut, Indiana, Maine, Pennsylvania). That they deleted the specific authorization rather than follow the model of those state statutes is not without significance.

[7] The Senate Committee Report's description, although otherwise identical, did not include the statement that the amendment was considered vital. *Supra*, this page.

mitted involuntary retirements. Indeed, their emphasis on encouraging the employment of older workers by allowing employers to make distinctions based on age in the provision of certain ancillary employment benefits, fully accords with the view that § 4 (f)(2) was intended only to permit those variations. Moreover, when the sponsors of the legislation explained the bill to the House and Senate during the debates preceding its passage, they made no mention of the possibility that § 4 (f)(2) permitted involuntary retirement and discussed it in terms incompatible with any such interpretation.[8] The following exchange between Senator Javits, the minority floor manager of the bill and Senator Yarborough, the majority floor manager, is illustrative:

> "Mr. JAVITS. The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—

[8] During the hearings, Senator Javits indicated that the administration bill might raise problems concerning existing pension plans. He stated that the involuntary retirement provision did not adequately address whether variations in benefits based on age would be permitted. Senate Hearings 27. Although, as the Court notes, he offered no objection during the hearings to the provision allowing involuntary retirement, it is significant that at no point in his statements on the floor of the Senate did he even hint that the bill as revised permitted involuntary retirement. Since Senator Javits had expressly acknowledged the permissibility of involuntary retirement under the administration's bill at the hearings, in explaining at length the meaning of § 4 (f)(2) as revised by the Committee he would surely have adverted to involuntary retirement if it were still allowed.

and we understand that—in order to give that older employee employment on the same terms as others.

"I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. . . .

"Mr. YARBOROUGH. I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. *This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan.*

"Mr. JAVITS. I thank my colleague. That is important to business people." 113 Cong. Rec. 31255 (1967) (emphasis added).[9]

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[9] The Court somehow finds that the above dialogue indicates approval by Senators Yarborough and Javits of mandatory retirement before age 65. *Ante*, at 202. I see nothing in this dialogue to suggest that the Senators thought involuntary retirement before age 65 was permissible.

The statements of those who criticized the bill for not going far enough lend still further support to the interpretation of the Act that would preclude forced retirement of persons covered by the Act. Senator Young spoke eloquently against subjecting those aged 65 or older to "[c]ompulsory retirement programs" which, he proclaimed, "have forged an iron collar" for those Americans "ready, willing and able" to work past 65. *Id.*, at 31256. Senator Young never alluded to the possibility that compulsory retirement of those under 65 and thus covered by the Act would be permitted, since the unmistakable premise of his argument was that, under the law being considered, compulsory retirement of covered employees was prohibited. *Ibid.* Others criticized § 4 (f)(2) because it authorized employers to deny older employees various benefits in accordance with benefit plans, but again made no reference to the possibility of forced retirement of covered employees. 113 Cong. Rec., at 34745 (remarks of Rep. Smith); *id.*, at 34750 (remarks of Rep. Randall). In view of the tenor and substance of those objections to the Act, it is inconceivable that these Congressmen would have remained silent had they understood § 4 (f)(2) to allow involuntary retirement before the age of 65.[10]

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[10] In contrast to this history which demonstrates forcefully that § 4 (f)(2) was not intended to provide for involuntary retirement, there are only two pieces of legislative history that provide even a modicum of support for the Court's interpretation. First, when he testified during the hearings on the House bill which then specifically permitted involuntary retirement, Secretary Wirtz was asked about the effect of the Senate Committee's modification of § 4 (f)(2). He responded that "[w]e count that change as not going to the substance and involving matters going to clarification which would present no problem." House Hearings 40. Since no exemption for benefit plans had been provided in the original bill, it is difficult to understand how Secretary Wirtz could reasonably have called the change only a "clarification." In any event, his statement at the hearings is entitled to far less weight than the Committee Reports and the statements by the floor managers and sponsors of the Act. See *Maintenance*

Any doubt as to the correctness of reading the Act to prohibit forced retirement is dispelled by considering the anomaly that results from the Court's contrary interpretation. Under §§ 4 (a) and 4 (f)(2), see n. 5, *supra*, it is unlawful for an employer to refuse to hire a job applicant under the age of 65 because of his age. If, as the Court holds, involuntary retirement before age 65 is permissible under § 4 (f)(2), the individual so retired has a simple route to regain his job: He need only reapply for the vacancy created by his retirement. As a new applicant, the individual plainly cannot be denied the job because of his age. And as someone with experience in performing the tasks of the "vacant" job he once held, the individual likely will be better qualified than any other applicant. Thus the individual retired one day would have to be hired the next. We should be loathe to attribute to Congress an intention to produce such a bizarre result.

One final reason exists for rejecting the Court's broad interpretation of the Act's exemption. The Age Discrimination in Employment Act is a remedial statute designed, in the Act's own words, "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary

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Employes v. *United States*, 366 U. S. 169, 176–177 (1961); *Leedom* v. *Mine, Mill, & Smelter Workers*, 352 U. S. 145, 149–150 (1956).

Second, on the House floor, Representatives Eilberg and Olsen, in voicing their support for the bill, stated that one reason the bill was necessary was that people who were retired needed to have opportunities for other employment open to them. 113 Cong. Rec. 34745 (1967); *id.*, at 34746. It is not entirely clear whether they were referring to people who would be involuntarily retired in the future, or only to those who had been retired prior to enactment of the Act. But even if they were implicitly expressing the view that the Act permits involuntary retirement, their statements stand in opposition to the clear import of every other statement on the floor of each House, as well as to the Committee Reports. Such a conflict must be resolved in favor of "the statements of those . . . most intimately connected with the final version of the statute." *Maintenance Employes* v. *United States*, *supra*, at 176–177. See remarks of Senator Yarborough, quoted *supra*, at 215.

age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." § 2 (b), 29 U. S. C. § 621 (b). It is well settled that such legislation should "be given a liberal interpretation . . . [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern R. Co.* v. *ICC*, 286 U. S. 299, 311–312 (1932). See also, *e. g.*, *Phillips Co.* v. *Walling*, 324 U. S. 490, 493 (1945). To construe the § 4 (f)(2) exemption broadly to authorize involuntary retirement when no statement in the Committee Reports or by the Act's floor managers or sponsors in the debates supports that interpretation flouts this fundamental principle of construction.

The mischief the Court fashions today may be short lived. Both the House and Senate have passed amendments to the Act. 123 Cong. Rec. H9984–9985 (daily ed. Sept. 23, 1977); *id.*, at S17303 (daily ed. Oct. 19, 1977). The amendments to § 4 (f)(2) expressly provide that the involuntary retirement of employees shall not be permitted or required pursuant to any employee benefit plan. Thus, today's decision may have virtually no prospective effect.[11] But the Committee Reports of both Houses make plain that, properly understood, the existing Act already prohibits involuntary retirement, and that the amendment is only a clarification necessitated by court decisions misconstruing congressional intent. H. R. Rep. No. 95–527, pp. 5–6 (1977); *id.*, at 27 (additional views of Rep. Weiss, quoting statement of Sen. Javits); S. Rep. No. 95–493, pp. 9–10 (1977).[12] Because the Court today has also

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[11] Indeed both the House and Senate bills provide that, because the addition to § 4 (f)(2) is only a clarification, it is to be effective immediately; by contrast, the effective date for other changes regarded as alterations of the 1967 Act has been deferred.

[12] The Committee Reports cite and discuss *Zinger* v. *Blanchette*, 549 F. 2d 901 (CA3 1977), cert. pending, No. 76–1375; *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (CA5 1974); and the instant case. H. R. Rep. No. 95–527, p. 5; S. Rep. No. 95–493, p. 10.

misconstrued congressional intent and has thereby deprived many older workers of the protection which Congress sought to afford, I must dissent.[13]

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[13] Because I do not interpret § 4 (f) (2) to authorize involuntary retirement, I have no occasion to address the questions discussed by the Court, *ante*, at 197–198, and by MR. JUSTICE STEWART, *ante*, at 204, as to whether the plan involved here is "a subterfuge to evade the purposes of [the Act]," 29 U. S. C. § 623 (f) (2). I am compelled to note, however, my emphatic disagreement with their suggestion that a pre-Act plan cannot be a subterfuge to avoid the purposes of the Act. The 1967 Committee Reports of both Houses expressly state: "It is important to note that [§ 4 (f) (2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings." H. R. Rep. No. 805, 90th Cong., 1st Sess., 4 (1967); see S. Rep. No. 723, 90th Cong., 1st Sess., 4 (1967).

MOORE *v.* ILLINOIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-5344. Argued October 3, 1977—Decided December 12, 1977

After petitioner had been arrested for rape and related offenses, he was identified by the complaining witness as her assailant at the ensuing preliminary hearing, during which petitioner was not represented by counsel nor offered appointed counsel. The victim had been asked to make identification after being told that she was going to view a suspect, after being told his name and having heard it called as he was led before the bench, and after having heard the prosecutor recite the evidence believed to implicate petitioner. Subsequently, petitioner was indicted, and counsel was appointed, who moved to suppress the victim's identification of petitioner. The Illinois trial court denied the motion on the ground that the prosecution had shown an independent basis for the victim's identification. At trial, the victim testified on direct examination by the prosecution that she had identified petitioner as her assailant at the preliminary hearing, and there was certain other evidence linking petitioner to the crimes. He was convicted and the Illinois Supreme Court affirmed. He then sought habeas corpus relief in Federal District Court on the ground that the admission of the identification testimony at trial violated his Sixth and Fourteenth Amendment rights, but the court denied relief again on the ground that the prosecution had shown an independent basis for the identification, and the Court of Appeals affirmed. *Held:*

1. Petitioner's Sixth Amendment right to counsel was violated by a corporeal identification conducted after the initiation of adversary judicial criminal proceedings and in the absence of counsel. *United States* v. *Wade*, 388 U. S. 218; *Gilbert* v. *California*, 388 U. S. 263. It is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case at the preliminary hearing, and if petitioner had been represented by counsel, some or all of this suggestiveness could have been avoided. And the prosecution could not properly buttress its case-in-chief by introducing evidence of a pretrial identification made in violation of petitioner's Sixth Amendment rights, even if it could prove that the pretrial identification had an independent source. Pp. 224–232.

2. The case will be remanded, however, for a determination of whether

the failure to exclude the evidence derived directly from the violation of petitioner's Sixth Amendment right to counsel was harmless constitutional error under *Chapman* v. *California*, 386 U. S. 18. P. 232.

534 F. 2d 331, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post*, p. 232. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 233. STEVENS, J., took no part in the consideration or decision of the case.

Patrick J. Hughes, Jr., argued the cause and filed briefs for petitioner.

Charles H. Levad, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the briefs was *William J. Scott*, Attorney General.

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner was convicted of rape and related offenses. At trial the complaining witness testified on direct examination by the prosecution that she had identified petitioner at a preliminary hearing at which he was not represented by counsel. The State Supreme Court affirmed petitioner's convictions, and the Federal District Court and Court of Appeals denied habeas corpus relief. We granted certiorari because of an apparent conflict between the decisions below and our holdings with respect to the right to counsel at corporeal identifications in *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); and *Kirby* v. *Illinois*, 406 U. S. 682 (1972). We reverse.

I

The victim of the offenses in question lived in an apartment on the South Side of Chicago. Shortly after noon on December 14, 1967, she awakened from a nap to find a man standing in the doorway to her bedroom holding a knife. The man entered the bedroom, threw her face down on the bed, and

choked her until she was quiet. After covering his face with a bandana, the intruder partially undressed the victim, forced her to commit oral sodomy, and raped her. Then he left, taking a guitar and a flute from the apartment.

When police arrived, the victim gave them a description of her assailant. Although she did not know who he was and had seen his face for only 10 to 15 seconds during the attack, she thought he was the same man who had made offensive remarks to her in a neighborhood bar the night before. She also gave police a notebook she had found next to her bed after the attack.

In the week that followed, police showed the victim two groups of photographs of men. From the first group of 200 she picked about 30 who resembled her assailant in height, weight, and build. From the second group of about 10, she picked two or three. One of these was of petitioner. Police also found a letter in the notebook that the victim had given them. Investigation revealed that it was written by a woman with whom petitioner had been staying. The letter had been taken from the woman's home in her absence, and petitioner appeared to be the only other person who had access to the home.

On the evening of December 20, 1967, police arrested petitioner at his apartment and held him overnight pending a preliminary hearing to determine whether he should be bound over to the grand jury and to set bail. The next morning, a policeman accompanied the victim to the Circuit Court of Cook County (First Municipal District) for the hearing. The policeman told her she was going to view a suspect and should identify him if she could. He also had her sign a complaint that named petitioner as her assailant. At the hearing, petitioner's name was called and he was led before the bench. The judge told petitioner that he was charged with rape and deviate sexual behavior. The judge then called the victim, who had been in the courtroom waiting for the case to be called, to come before the bench. The State's Attorney stated

that police had found evidence linking petitioner with the offenses charged. He asked the victim whether she saw her assailant in the courtroom, and she pointed at petitioner. The State's Attorney then requested a continuance of the hearing because more time was needed to check fingerprints. The judge granted the continuance and fixed bail. Petitioner was not represented by counsel at this hearing, and the court did not offer to appoint counsel.

At a subsequent hearing, petitioner was bound over to the grand jury, which indicted him for rape, deviate sexual behavior, burglary, and robbery. Counsel was appointed, and he moved to suppress the victim's identification of petitioner because it had been elicited at the preliminary hearing through an unnecessarily suggestive procedure at which petitioner was not represented by counsel.[1] After an evidentiary hearing the trial court denied the motion on the ground that the prosecution had shown an independent basis for the victim's identification.

At trial, the victim testified on direct examination by the prosecution that she had identified petitioner as her assailant at the preliminary hearing. She also testified that the defendant on trial was the man who had raped her. The prosecution's other evidence linking petitioner with the crimes was the letter found in the victim's apartment. Defense counsel stipulated that petitioner had taken the letter from his woman friend's home, but he presented evidence that petitioner might have lost the notebook containing the letter at the neighborhood bar the night before the attack. The defense theory was that the victim, who also was in the bar that night, could have picked up the notebook by mistake and taken it home.

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[1] Counsel for petitioner explicitly drew the court's attention to our then recent decision in *United States* v. *Wade*, 388 U. S. 218 (1967): "If we may look at the Wade case, Your Honor, it has as its holding, Your Honor, the requirement that a defendant have an attorney at an identification procedure . . . ." Trial Transcript 132.

The defense also called witnesses who testified that petitioner was with them in a college lunchroom in another part of Chicago at the time the attack was committed.

The jury found petitioner guilty on all four counts, thus rejecting his theory and alibi. The trial court sentenced him to 30 to 50 years in prison. The Illinois Supreme Court affirmed. *People* v. *Moore*, 51 Ill. 2d 79, 281 N. E. 2d 294 (1972). It rejected petitioner's argument that the victim's identification testimony should have been excluded, on the ground that the prosecution had shown an "independent basis" for the identification. *Id.*, at 86, 281 N. E. 2d, at 298. After this Court denied certiorari, 409 U. S. 979 (1972), petitioner sought a writ of habeas corpus from the Federal District Court. He contended that admission of the identification testimony at trial violated his Sixth and Fourteenth Amendment rights. Relying on the transcript from the state proceedings, the District Court denied the writ in an unpublished opinion, again on the ground that the prosecution had shown an independent basis for the identification. App. 31–35. The Court of Appeals for the Seventh Circuit affirmed in an unpublished opinion, *United States ex rel. Moore* v. *Illinois*, 534 F. 2d 331 (1976), and we granted certiorari. 429 U. S. 1061 (1977).

II

United States v. *Wade*, 388 U. S. 218 (1967), held that a pretrial corporeal identification conducted after a suspect has been indicted is a critical stage in a criminal prosecution at which the Sixth Amendment entitles the accused to the presence of counsel. The Court emphasized the dangers inherent in a pretrial identification conducted in the absence of counsel. Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make

a mistaken identification. The witness then will be predisposed to adhere to this identification in subsequent testimony at trial. *Id.*, at 229, 235–236. If an accused's counsel is present at the pretrial identification, he can serve both his client's and the prosecution's interests by objecting to suggestive features of a procedure before they influence a witness' identification. *Id.*, at 236, 238. In view of the "variables and pitfalls" that exist at an uncounseled pretrial identification, *id.*, at 235, the *Wade* Court reasoned:

> "[T]he first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" *Id.*, at 235–236.

Wade and its companion case, *Gilbert* v. *California*, 388 U. S. 263 (1967), also considered the admissibility of evidence derived from a corporeal identification conducted in violation of the accused's right to counsel. In *Wade*, witnesses to a robbery who had identified the defendant at an uncounseled pretrial lineup testified at trial on direct examination by the prosecution that he was the man who had committed the robbery. The prosecution did not elicit from the witnesses the fact that they had identified the defendant at the pretrial lineup. Nevertheless, because of the likelihood that the witnesses' in-court identifications were based on their observations of the defendant at the uncounseled lineup rather than at the scene of the crime, the Court held that this testimony should have been excluded unless the prosecution could "establish by clear and convincing evidence that the in-court identifications

were based upon observations of the suspect other than the lineup identification." 388 U. S., at 240.[2]

Gilbert differed from *Wade* in one critical respect. In *Gilbert* the prosecution did elicit testimony in its case-in-chief that witnesses had identified the accused at an uncounseled pretrial lineup. The Court recognized that such testimony would "enhance the impact of [a witness'] in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial." 388 U. S., at 273–274. Because "[t]hat testimony [was] the direct result of the illegal lineup 'come at by exploitation of [the primary] illegality[,]' *Wong Sun* v. *United States*, 371 U. S. 471, 488," the prosecution was "not entitled to an opportunity to show that the testimony had an independent source." *Id.*, at 272–273; see also *Wade*, *supra*, at 240 n. 32. The Court announced this exclusionary rule in the belief that such a sanction is necessary "to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Gilbert*, *supra*, at 273. The Court therefore reversed the conviction and remanded to the state court for a determination of whether admission of this evidence was harmless constitutional error under *Chapman* v. *California*, 386 U. S. 18 (1967). 388 U. S., at 274.

In *Kirby* v. *Illinois*, 406 U. S. 682 (1972), the plurality opinion made clear that the right to counsel announced in *Wade* and *Gilbert* attaches only to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

[2] Among the factors to be considered in making this determination are "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification." 388 U. S., at 241.

406 U. S., at 689. This is so because the initiation of such proceedings "marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.*, at 690. Thus, in *Kirby* the plurality held that the prosecution's evidence of a robbery victim's one-on-one stationhouse identification of an uncounseled suspect shortly after the suspect's arrest was admissible because adversary judicial criminal proceedings had not yet been initiated. In such cases, however, due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. *Id.*, at 690–691; *Neil* v. *Biggers*, 409 U. S. 188 (1972); *Stovall* v. *Denno*, 388 U. S. 293 (1967); see generally *Manson* v. *Brathwaite*, 432 U. S. 98 (1977).[3]

III

In the instant case, petitioner argues that the preliminary hearing at which the victim identified him marked the initiation of adversary judicial criminal proceedings against him. Hence, under *Wade*, *Gilbert*, and *Kirby*, he was entitled to the presence of counsel at that confrontation. Moreover, the

[3] In *United States* v. *Ash*, 413 U. S. 300 (1973), the Court held that the Sixth Amendment does not require that defense counsel be present when a witness views police or prosecution photographic arrays. A photographic showing, unlike a corporeal identification, is not a "trial-like adversary confrontation" between an accused and agents of the government; hence, "no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary." *Id.*, at 317. Moreover, even without attending the prosecution's photographic showing, defense counsel has an equal chance to prepare for trial by presenting his own photographic displays to witnesses before trial. But "[d]uplication by defense counsel is a safeguard that normally is not available when a formal confrontation occurs." *Id.*, at 318 n. 10. An accused nevertheless is entitled to due process protection against the introduction of evidence of, or tainted by, unreliable identifications elicited through unnecessarily suggestive photographic displays. *Id.*, at 320; *Manson* v. *Brathwaite*; *Simmons* v. *United States*, 390 U. S. 377 (1968).

prosecution introduced evidence of this uncounseled corporeal identification at trial in its case-in-chief. Petitioner contends that under *Gilbert,* this evidence should have been excluded without regard to whether there was an "independent source" for it.

The Court of Appeals took a different view of the case. It read *Kirby* as holding that evidence of a corporeal identification conducted in the absence of defense counsel must be excluded only if the identification is made after the defendant is *indicted.* App. 45–46. Such a reading cannot be squared with *Kirby* itself, which held that an accused's rights under *Wade* and *Gilbert* attach to identifications conducted "at or after the initiation of adversary judicial criminal proceedings," including proceedings instituted "by way of formal charge [or] preliminary hearing." 406 U. S., at 689. The prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court. See Ill. Rev. Stat., ch. 38, § 111 (1975). The purpose of the preliminary hearing was to determine whether there was probable cause to bind petitioner over to the grand jury and to set bail. §§ 109–1, 109–3. Petitioner had the right to oppose the prosecution at that hearing by moving to dismiss the charges and to suppress the evidence against him. § 109–3 (e). He faced counsel for the State, who elicited the victim's identification, summarized the State's other evidence against petitioner, and urged that the State be given more time to marshal its evidence. It is plain that "the government ha[d] committed itself to prosecute," and that petitioner found "himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby, supra,* at 689. The State candidly concedes that this preliminary hearing marked the "initiation of adversary judicial criminal proceedings" against petitioner, Brief for Respondent 8, and n. 1; Tr. of Oral Arg. 32, 34, and it hardly could contend otherwise. The Court of Appeals therefore erred in holding

that petitioner's rights under *Wade* and *Gilbert* had not yet attached at the time of the preliminary hearing.

The Court of Appeals also suggested that *Wade* and *Gilbert* did not apply here because the "in-court identification could hardly be considered a line-up." App. 45. The meaning of this statement is not entirely clear. If the court meant that a one-on-one identification procedure, as distinguished from a lineup, is not subject to the counsel requirement, it was mistaken. Although *Wade* and *Gilbert* both involved lineups, *Wade* clearly contemplated that counsel would be required in both situations: "The pretrial confrontation for purpose of identification may take the form of a lineup . . . or presentation of the suspect alone to the witness . . . . It is obvious that risks of suggestion attend either form of confrontation . . . ." 388 U. S., at 229; see also *id.*, at 251 (WHITE, J., dissenting in part and concurring in part); cf. *Stovall* v. *Denno, supra; Kirby* v. *Illinois.* Indeed, a one-on-one confrontation generally is thought to present greater risks of mistaken identification than a lineup. *E. g.*, P. Wall, Eye-Witness Identification in Criminal Cases 27–40 (1965); Williams & Hammelmann, Identification Parades—I, Crim. L. Rev. 479, 480–481 (1963). There is no reason, then, to hold that a one-on-one identification procedure is not subject to the same requirements as a lineup.

If the court believed that petitioner did not have a right to counsel at this identification procedure because it was conducted in the course of a judicial proceeding, we do not agree. The reasons supporting *Wade*'s holding that a corporeal identification is a critical stage of a criminal prosecution for Sixth Amendment purposes apply with equal force to this identification. It is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case. The victim, who had seen her assailant for only 10 to 15 seconds, was asked to make her identification after she was told that she

was going to view a suspect, after she was told his name and heard it called as he was led before the bench, and after she heard the prosecutor recite the evidence believed to implicate petitioner.[4] Had petitioner been represented by counsel, some or all of this suggestiveness could have been avoided.[5]

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[4] Immediately before the State's Attorney asked the victim to identify petitioner, he stated:

"This is an allegation of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park and the victim was raped and forced to commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day." App. 48–49.

It appears from the record that although a guitar and a flute were found in petitioner's apartment when he was arrested, they were not the ones taken from the victim's apartment and they were not introduced into evidence at petitioner's trial. Transcript of Proceedings at Hearing of Feb. 5, 1968, p. 10; Trial Transcript 44–45, 400–401. Neither was any clothing.

[5] For example, counsel could have requested that the hearing be postponed until a lineup could be arranged at which the victim would view petitioner in a less suggestive setting. See, *e. g., United States* v. *Ravich,* 421 F. 2d 1196, 1202–1203 (CA2), cert. denied, 400 U. S. 834 (1970); *Mason* v. *United States,* 134 U. S. App. D. C. 280, 283 n. 19, 414 F. 2d 1176, 1179 n. 19 (1969). Short of that, counsel could have asked that the victim be excused from the courtroom while the charges were read and the evidence against petitioner was recited, and that petitioner be seated with other people in the audience when the victim attempted an identification. See *Allen* v. *Rhay,* 431 F. 2d 1160, 1165 (CA9 1970), cert. denied, 404 U. S. 834 (1971). Counsel might have sought to cross-examine the victim to test her identification before it hardened. Cf. *Haberstroh* v. *Montanye,* 493 F. 2d 483, 485 (CA2 1974); *United States ex rel. Riffert* v. *Rundle,* 464 F. 2d 1348, 1351 (CA3 1972), cert. denied *sub nom. Riffert* v. *Johnson,* 415 U. S. 927 (1974). Because it is in the prosecution's interest as well as the accused's that witnesses' identifications remain untainted, see *Wade,* 388 U. S., at 238, we cannot assume that such requests would have been in vain. Such requests ordinarily are addressed to the sound discretion of the court, see *United States* v. *Ravich, supra,* at 1203; we express no

In sum, we are unpersuaded by the reasons advanced by the Court of Appeals for distinguishing the identification procedure in this case from those considered in *Wade* and *Gilbert*. Here, as in those cases, petitioner's Sixth Amendment rights were violated by a corporeal identification conducted after the initiation of adversary judicial criminal proceedings and in the absence of counsel. The courts below thought that the victim's testimony at trial that she had identified petitioner at an uncounseled pretrial confrontation was admissible even if petitioner's rights had been violated, because there was an "independent source" for the victim's identification at the uncounseled confrontation. 51 Ill. 2d, at 86, 281 N. E. 2d, at 298; App. 35 (District Court), 45–46 (Court of Appeals).[6] But *Gilbert* held that the prosecution cannot buttress its case-in-chief by introducing evidence of a pretrial identification made in violation of the accused's Sixth Amendment rights, even if it can prove that the pretrial identification had an independent source. "That testimony is the direct result of the illegal lineup 'come at by exploitation of [the primary] illegality,' " *Gilbert*, 388 U. S., at 272–273, and the prosecution is "therefore not entitled to an opportunity to show that the testimony had an independent source." *Id.*, at 273. Because the prosecution made use of such testimony

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opinion as to whether the preliminary hearing court would have been required to grant any such requests.

[6] The existence of an "independent source" was thought to be demonstrated by the victim's selection of a picture of petitioner from the second photographic array. The courts below and the parties here have not been certain as to how many pictures the victim actually selected from that array. Although there is some ambiguity in the record, compare Trial Transcript 110–111, 113–114, 167, 290–292, 294, 307–308, 421, 454, with *id.*, at 155–156, 158, 231–232, we think a fair reading indicates that the victim selected more than one photograph and that she did not make a positive identification of petitioner from them. But resolution of this factual issue is not necessary to our decision in this case.

in this case, petitioner is entitled to the benefit of the strict rule of *Gilbert*.

IV

In view of the violation of petitioner's Sixth and Fourteenth Amendment right to counsel at the pretrial corporeal identification, and of the prosecution's exploitation at trial of evidence derived directly from that violation, we reverse the judgment of the Court of Appeals and remand for a determination of whether the failure to exclude that evidence was harmless constitutional error under *Chapman* v. *California*, 386 U. S. 18 (1967). See *Gilbert, supra*, at 274. That court also will be free on remand to re-examine the other issues presented by the petition, upon which we do not pass.[7]

Reversed and remanded.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST, concurring.

In 1964, this Court held that in certain limited circumstances a statement given to police after persistent questioning would be suppressed at trial if the suspect had repeatedly requested, and been denied, an opportunity to consult with his attorney. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491. At the time, there were intimations that this ruling rested largely on the Sixth Amendment guarantee of right to counsel at critical stages of the criminal proceeding. *Id.*, at 484–485, 486. Shortly thereafter, however, the Court perceived "that

[7] In addition to his *Gilbert* argument, petitioner urges that the victim's in-court identification was tainted by the prior uncounseled identification, see *Wade;* that the in-court identification was the unreliable product of an unnecessarily suggestive identification procedure and should have been excluded under the Due Process Clause of the Fourteenth Amendment, see *Manson* v. *Brathwaite*, 432 U. S. 98 (1977); and that the trial court's denial of a transcript of the preliminary hearing was prejudicial constitutional error, see *Roberts* v. *LaVallee*, 389 U. S. 40 (1967).

the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . . .' *Johnson* v. *New Jersey*, 384 U. S. 719, 729." *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (STEWART, J.). Cf. *Darwin* v. *Connecticut*, 391 U. S. 346, 349 (1968). Accordingly, *Escobedo* was largely limited to its facts. See *Johnson* v. *New Jersey*, 384 U. S. 719, 733–734 (1966); *Kirby* v. *Illinois*, *supra*; *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969); *Michigan* v. *Tucker*, 417 U. S. 433, 438 (1974). This, of course, left open the possibility of examining the voluntariness of a confession under a more appropriate standard—the totality of the circumstances. Cf. *Clewis* v. *Texas*, 386 U. S. 707 (1967).

I believe the time will come when the Court will have to re-evaluate and reconsider the *Wade-Gilbert** rule for many of the same reasons. The rule was established to ensure the accuracy and reliability of pretrial identifications and the Court will have to decide whether a *per se* exclusionary rule should still apply or whether *Wade-Gilbert* violations, like other questions involving the reliability of pretrial identification, should be judged under the totality of the circumstances. Cf. *Manson* v. *Brathwaite*, 432 U. S. 98, 106 (1977); cf. *Kirby* v. *Illinois*, *supra*, at 690–691; *Simmons* v. *United States*, 390 U. S. 377, 383 (1968); *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967). However, since the State has chosen not to press this point and because I believe the Court's opinion is a correct reading of *Wade* and *Gilbert*, I concur in the opinion and judgment of the Court.

MR. JUSTICE BLACKMUN, concurring in the result.

I concur in the result, and I join the Court in remanding the case for a determination as to whether the adjudged error was

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**United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967).

harmless. On the record of this case, the conclusion that it was harmless seems to me to be almost inevitable; that, however, is for the courts below to decide in the first instance.

I feel, furthermore, that the Court in its opinion has made more out of this case than its facts warrant. As the Court points out, *ante*, at 228, the State of Illinois has conceded, Brief for Respondent 8, and n. 1; Tr. of Oral Arg. 32, 34, that the so-called preliminary hearing on December 21, 1967, at which the victim testified, was the initiation of adversary judicial criminal proceedings against petitioner. At trial, the victim testified that at that hearing she had identified petitioner as her assailant. This being so, the ban of *Gilbert* v. *California*, 388 U. S. 263 (1967), applies in full force and in itself would require the remand the Court orders. With the State's concession, I see no need to wrestle with the issue whether what took place on December 21 marked the initiation of formal proceedings against petitioner in the sense of *Kirby* v. *Illinois*, 406 U. S. 682 (1972), and thereby possibly to become entangled with the ghost, unmentioned by the Court, of the holding in *Coleman* v. *Alabama*, 399 U. S. 1 (1970). determined not to be retroactive in *Adams* v. *Illinois*, 405 U. S. 278 (1972).

One last word: I disassociate myself from the implication—twice appearing in the Court's opinion, *ante*, at 222 and at 229—that there is something insignificant or unreliable about a rape victim's observation during the crime of the facial features of her assailant when that observation lasts "only 10 to 15 seconds." Time, of course, is always a comparative matter. Fifteen seconds perhaps would mean little in the identification of scores of separate individuals participating in an illegal riot. But 10 to 15 seconds of observation of the face of a rapist at midday by his female victim during the commission of the crime by no means is insufficient to leave an accurate and indelible impression on the victim. One need only observe another person's face for 10 seconds by the clock to know this.

To the resisting woman, the 10 to 15 seconds would seem endless. No female victim of a rape, given that period of daylight observation, will ever believe otherwise. I therefore cannot be a party to the Court's degradation, and almost literal dismissal, of so vital an observation.

CHASE MANHATTAN BANK (NATIONAL ASSOCIATION) *v.* SOUTH ACRES DEVELOPMENT CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-267. Decided January 9, 1978

The District Court of Guam *held* not authorized to exercise federal diversity jurisdiction.

(a) Title 48 U. S. C. § 1424 (a), setting forth the District Court's jurisdiction, contains no provision for diversity jurisdiction, and the first clause of that statute granting the court federal-question jurisdiction cannot be construed as also encompassing diversity jurisdiction, the Constitution itself distinguishing between these two types of jurisdiction.

(b) Nor does the fact that Congress in 48 U. S. C. § 1421b (u) extended the Privileges and Immunities Clauses to Guam disclose an intention impliedly to authorize the District Court to exercise diversity jurisdiction, there being nothing in § 1421b (u)'s language or legislative history to support a finding of such intention.

Certiorari granted; 554 F. 2d 976, reversed.

PER CURIAM.

The issue in this case is whether Congress has authorized the District Court of Guam to exercise federal diversity jurisdiction. Respondent brought suit in the Guam District Court, claiming that the court had jurisdiction over its action on the basis of diverse citizenship. The court agreed, denied petitioner's motion to dismiss for lack of jurisdiction,[1] *Mailloux* v. *Mailloux*, 417 F. Supp. 11 (1975), and a divided Court of Appeals affirmed. 554 F. 2d 976 (CA9 1977). Because Congress has neither explicitly nor implicitly granted diversity jurisdiction to the District Court of Guam, we reverse.

As part of the Organic Act of Guam, Congress created the District Court of Guam. 64 Stat. 389, 48 U. S. C. § 1424 (a).

[1] The District Court certified its interlocutory decision for immediate appeal under 28 U. S. C. § 1292 (b).

The District Court was established "under Art. IV, § 3, of the Federal Constitution rather than under Art. III," *Guam* v. *Olsen*, 431 U. S. 195, 196–197, n. 1 (1977),[2] and Congress provided that the District Court would have the following jurisdiction:

> "The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine." 48 U. S. C. § 1424 (a).

Conspicuously absent in this provision is any mention of federal diversity jurisdiction. The provision's first clause follows the language of the federal-question statute, 28 U. S. C. § 1331, and the federal-question clause of Art. III, § 2. The second clause establishes original jurisdiction over local causes of action without regard to diversity of citizenship. The second clause is not applicable to this case, however, because in 1974 the Guam Legislature transferred jurisdiction of all cases arising under the laws of Guam from the District Court to the local courts.[3] Thus, the only issue before us is

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[2] We are, therefore, not faced with the question of what jurisdictional limits Congress may place upon federal district courts established under Art. III. Congress' broad power over Territories under Art. IV is, of course, well established. See, *e. g.*, *Binns* v. *United States*, 194 U. S. 486 (1904).

[3] Court Reorganization Act of 1974, Guam Pub. L. 12–85, § 55. The Court of Appeals for the Ninth Circuit has held that the jurisdiction of the local court under the Court Reorganization Act is exclusive and not concurrent with the Guam District Court. *Agana Bay Dev. Co.* (*Hong Kong*) v. *Supreme Court of Guam*, 529 F. 2d 952, 955 n. 4 (1976). As

whether the first clause, which grants federal-question jurisdiction to the District Court, see *Guam* v. *Olsen, supra,* at 199–200, also encompasses diversity jurisdiction. The Court of Appeals apparently reasoned that any cause of action with diverse parties "arises under the . . . laws . . . of the United States," since 28 U. S. C. § 1332, the diversity statute, is a law of the United States. By this logic, any cause of action with diverse parties under § 1332 would be within the scope of federal-question jurisdiction. But as we stated in *Guam* v. *Olsen,* "whatever may be the ambiguities of the phrase 'arising under [the Constitution, treaties, and laws of the United States]'—it does not embrace all civil cases that may present questions of federal law." 431 U. S., at 202. By the same token, it does not embrace federal diversity jurisdiction. The short answer to the contention that diversity jurisdiction is merely a species of federal-question jurisdiction is that the Constitution itself distinguishes between these two types of jurisdictions. "The Constitution certainly contemplates these . . . as distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over . . . the other . . . . The discrimination made between them, in the Constitution, is, we think, conclusive against their identity." *American Insurance Co.* v. *Canter,* 1 Pet. 511, 545 (1828).

We also reject the notion that Congress, by extending the Privileges and Immunities Clauses of the Federal Constitution to Guam, 48 U. S. C. § 1421b (u), intended and implicitly authorized the Guam District Court to exercise federal diversity jurisdiction. 554 F. 2d, at 977. This Court has never held that the Privileges and Immunities Clauses prohibit Congress from withholding or restricting diversity jurisdiction,[4]

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in *Guam* v. *Olsen,* 431 U. S., at 197 n. 3, that holding is not at issue in this case.

[4] Indeed, we have never held that the Privileges and Immunities Clauses of Art. IV, § 2, cl. 1, and the Fourteenth Amendment restrict congressional—as opposed to state—action.

and there is nothing in the legislative history of § 1421b (u) to suggest that Congress intended that provision to have any effect on the Guam District Court's original jurisdiction.[5] Without support in the language or legislative history of the section, it is simply untenable to interpret § 1421b (u) either as conferring diversity jurisdiction by its own terms or as impliedly expanding the grant of original jurisdiction contained in § 1424 (a).

We recognize that Congress' jurisdictional grant to the District Court of Guam is unique. All other federal district courts in the States and Territories exercise either diversity jurisdiction or concurrent original jurisdiction over many local causes of action. See 554 F. 2d, at 984 n. 18 (Sneed, J., dissenting). Whether or not this peculiar treatment of the Guam District Court is preferable or even wise, however, we are constrained by the principle that federal courts are courts

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[5] In fact, the legislative history of § 1421b (u) reveals that Congress' intent in extending the Privileges and Immunities Clauses to Guam was "to limit the power of the territorial legislature rather than affect the jurisdiction of the district court. . . ." 554 F. 2d, at 984 n. 17 (Sneed, J., dissenting). There is limited support in the legislative history for the view that Congress was also concerned with the ability of citizens "to *appeal* in proper cases to the national courts . . . ." S. Rep. No. 216, 90th Cong., 1st Sess., 12 (1967) (letter of Feb. 19, 1967, from Assistant Secretary of Interior Harry R. Anderson to Senator Henry M. Jackson, Chairman of Committee on Interior and Insular Affairs) (emphasis added); see also H. R. Rep. No. 1521, 90th Cong., 2d Sess., 14 (1968). It is doubtful that this one statement could serve as a sufficient basis for concluding that Congress impliedly amended its jurisdictional grant to the Guam District Court through the oblique mechanism of the Privileges and Immunities Clauses. But even if it could, the jurisdictional grant at issue here does not deny Guam litigants "access to Art. III courts for appellate review of local-court decisions . . . ." *Guam* v. *Olsen*, 431 U. S., at 204. Only the limitation on the District Court's original jurisdiction under the first clause of § 1424 (a), as quoted *supra*, is at issue here, and there is nothing in the legislative history of § 1421b (u) to suggest that Congress intended to alter the plain language of that jurisdictional grant.

of limited jurisdiction. Where, as here, Congress has clearly established appropriate limitations on the District Court's original jurisdiction, we are compelled to respect those limits.

The petition for a writ of certiorari is granted, and the decision of the Court of Appeals is reversed.

So ordered.

PHILADELPHIA NEWSPAPERS, INC., ET AL. *v.* JEROME, JUDGE

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 77-308. Decided January 9, 1978*

Where the record does not disclose whether the Pennsylvania Supreme Court, in denying appellants' mandamus petition seeking access by the press and public to pretrial suppression hearings in state criminal proceedings, passed on appellants' federal constitutional claims or based denial on an adequate and independent state ground, the judgment is vacated, and the case is remanded for further proceedings.

Vacated and remanded.

PER CURIAM.

The proceedings below were brought to gain access by the press and public to pretrial suppression hearings in three separate state criminal proceedings. Access was denied and the trial judges closed all pretrial hearings and sealed and impounded all papers, documents, and records filed in the cases. The judges also prohibited the parties, their attorneys, public officials, and certain others, from disseminating information concerning the hearings. Appellants then filed petitions for writs of mandamus with the Supreme Court of Pennsylvania. However, these were denied without opinion. Appellants, arguing that they have been denied their federal constitutional rights, now urge us to take appellate jurisdiction of these matters under 28 U. S. C. § 1257 (2).

As matters now stand, the record does not disclose whether the Supreme Court of Pennsylvania passed on appellants' federal claims or whether it denied mandamus on an adequate

*Together with *Equitable Publishing Co., Inc., et al.* v. *Honeyman, Judge; Montgomery Publishing Co.* v. *Honeyman, Judge; Equitable Publishing Co., Inc., et al.* v. *Brown, Judge;* and *Montgomery Publishing Co.* v. *Brown, Judge,* also on appeal from the same court (see this Court's Rule 15 (3)).

and independent state ground. For this reason, we vacate the judgments of the Supreme Court, and remand the cause to that court for such further proceedings as it may deem appropriate to clarify the record. See *California* v. *Krivda*, 409 U. S. 33 (1972).

So ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEVENS joins, dissenting.

The Court today summarily vacates the judgments of the State Supreme Court and remands for further proceedings. Neither past decisions of this Court nor policy considerations support this unwarranted assumption of jurisdiction and imposition on the state courts.

The Pennsylvania Rules of Criminal Procedure permit a trial judge to close pretrial suppression hearings from the press and public at the request of the criminal defendant, mandate that all records of such hearings be sealed, and allow the judge in a "widely-publicized or sensational case" to prohibit parties and witnesses from making extrajudicial statements. This appeal stems from the entry of such orders in three Pennsylvania murder trials. In the first trial, appellants filed a petition to vacate the orders with the trial judge; on the same day, appellants also filed petitions for writ of mandamus and prohibition and for plenary jurisdiction with the Pennsylvania Supreme Court. The petition to vacate was denied by the trial judge after the suppression hearing on the ground, according to appellants, that "he was obligated to accord *prima facie* validity to the Pennsylvania Supreme Court's Rules." The Pennsylvania Supreme Court two weeks later denied the petitions for mandamus and for plenary jurisdiction without opinion. Appellants filed similar petitions to vacate with the Common Pleas judges presiding over the other two trials; these petitions were denied on the ground that appellants lacked standing to challenge the orders. Appellants thereafter again

filed petitions for mandamus and prohibition and for plenary jurisdiction with the Pennsylvania Supreme Court which were denied without opinion.

We do not know why the Pennsylvania Supreme Court denied appellants' petitions for writ of mandamus and prohibition and for plenary jurisdiction.[1] There is no reason to presume that the petitions were rejected because the Pennsylvania Supreme Court disagreed with appellants' constitutional claims. The petitions were for extraordinary relief. The Pennsylvania Supreme Court has consistently emphasized that such petitions are "to be used only with great caution and forbearance and as an extraordinary remedy in cases of extreme necessity, to secure order and regularity in judicial proceedings if none of the ordinary remedies provided by law is applicable or adequate to afford relief." Such relief "is not of absolute right but rests largely in the sound discretion of the court. It will never be granted where there is a complete and effective remedy by appeal, certiorari, writ of error, injunction, or otherwise." *Carpentertown Coal & Coke Co.* v. *Laird,* 360 Pa. 94, 102, 61 A. 2d 426, 430 (1948). See also *Commonwealth ex rel. Specter* v. *Shiomos,* 457 Pa. 104, 320 A. 2d 134 (1974); *In re Specter,* 455 Pa. 518, 317 A. 2d 286 (1974); *Francis* v. *Corleto,* 418 Pa. 417, 211 A. 2d 503 (1965).

While appellants claim that their petitions to the Pennsylvania Supreme Court drew into question the constitutional validity of the sections of the Pennsylvania Rules of Criminal Procedure described above, the Pennsylvania Supreme Court's

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[1] Title 17 Pa. Cons. Stat. § 211.201 (Purdon Supp. 1977) gives the Supreme Court of Pennsylvania "original but not exclusive jurisdiction" to issue writs of mandamus or prohibition to courts of inferior jurisdiction. Title 17 Pa. Cons. Stat. § 211.205 (Purdon Supp. 1977), entitled "Extraordinary Jurisdiction," permits the Supreme Court of Pennsylvania to assume plenary jurisdiction "on its own motion or upon petition of any party, in any matter pending before any court or justice of the peace of this Commonwealth involving an issue of immediate public importance."

denials of their petitions did not on its face decide in favor of the Rules' validity. Thus, it would not appear that we have jurisdiction to note the appeal under 28 U. S. C. § 1257 (2).[2]

Of course, the denials may have been grounded on a decision by the Pennsylvania Supreme Court that the Rules do not violate the Federal Constitution. But this does not require that we vacate a presumably valid judgment of a state supreme court and remand for further proceedings. A less intrusive alternative, and one supported by past precedents of this Court, is to postpone consideration of jurisdiction until appellants have had an opportunity to demonstrate that the judgment appealed from does not rest on an independent and adequate state ground. See, *e. g.*, *Lynum* v. *Illinois*, 368 U. S. 908 (1961) (consideration of certiorari deferred "to accord counsel for petitioner opportunity to secure a certificate from the Supreme Court of Illinois as to whether the judgment herein was intended to rest on an adequate and independent state ground"); *Herb* v. *Pitcairn*, 324 U. S. 117 (1945). By vacating the judgment below, this Court is taking from appellants the normal burden of demonstrating that we have jurisdiction and placing it on the Supreme Court of Pennsylvania. We deny extraordinary relief regularly without typically expressing our reasons for so doing. We should not place a higher requirement on state supreme courts under penalty of this Court's vacating their judgment.

The Supreme Court of Pennsylvania did not affirm the orders of the trial judges. If it had and if there were reasonable doubt as to whether the affirmance were on state or federal grounds, the precedential and res judicata effects of the affirmance might call for vacating the judgment below. Cf.

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[2] Section 1257 (2) provides for Supreme Court review of final judgments rendered by the highest court of a State "[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

California v. *Krivda*, 409 U. S. 33 (1972) (judgment affirming a suppression order vacated when it was unclear whether judgment rested on state or federal constitutional grounds). However, the Supreme Court of Pennsylvania has merely denied extraordinary and discretionary relief without indicating any opinion on appellants' constitutional challenge. Appellants are thus presumably free to pursue their challenge through state and federal actions still open to them. Under similar circumstances, where it was unclear whether the lower court denied relief on the merits or because the wrong remedy had been chosen, this Court has dismissed the appeal or petition for certiorari. See, *e. g.*, *Phyle* v. *Duffy*, 334 U. S. 431 (1948); *Woods* v. *Nierstheimer*, 328 U. S. 211 (1946); *White* v. *Ragen*, 324 U. S. 760 (1945). I would do that here unless appellants carry their burden of establishing that the decisions of the Supreme Court of Pennsylvania did *not* rest on an adequate state ground.

QUILLOIN *v.* WALCOTT ET VIR

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 76-6372. Argued November 9, 1977—Decided January 10, 1978

Under Georgia law no adoption of a child born in wedlock is permitted without the consent of each living parent (including divorced or separated parents) who has not voluntarily surrendered rights in the child or been adjudicated an unfit parent. In contrast, §§ 74-403 (3) and 74-203 of the Georgia Code provide that only the mother's consent is required for the adoption of an illegitimate child. However, the father may acquire veto authority over the adoption if he has legitimated the child pursuant to § 74-103 of the Code. These provisions were applied to deny appellant, the father of an illegitimate child, authority to prevent the adoption of the child by the husband of the child's mother. Until the adoption petition was filed, appellant had not attempted to legitimate the child, who had always been in the mother's custody and was then living with the mother and her husband, appellees. In opposing the adoption appellant, seeking to legitimate the child but not to secure custody, claimed that §§ 74-203 and 74-403 (3), as applied to his case, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court, granting the adoption on the ground that it was in the "best interests of the child" and that legitimation by appellant was not, rejected appellant's constitutional claims, and the Georgia Supreme Court affirmed. *Held:*

1. Under the circumstances appellant's substantive rights under the Due Process Clause were not violated by application of a "best interests of the child" standard. This is not a case in which the unwed father at any time had, or sought, custody of his child or in which the proposed adoption would place the child with a new set of parents with whom the child had never lived. Rather, the result of adoption here is to give full recognition to an existing family unit. Pp. 254-255.

2. Equal protection principles do not require that appellant's authority to veto an adoption be measured by the same standard as is applied to a divorced father, from whose interests appellant's interests are readily distinguishable. The State was not foreclosed from recognizing the difference in the extent of commitment to a child's welfare between that of appellant, an unwed father who has never shouldered any significant responsibility for the child's rearing, and that of a divorced father who

at least will have borne full responsibility for his child's rearing during the period of marriage. Pp. 255–256.

238 Ga. 230, 232 S. E. 2d 246, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

William L. Skinner argued the cause and filed a brief for appellant.

Thomas F. Jones argued the cause for appellees *pro hac vice*. With him on the brief was *S. Ralph Martin, Jr.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is the constitutionality of Georgia's adoption laws as applied to deny an unwed father authority to prevent adoption of his illegitimate child. The child was born in December 1964 and has been in the custody and control of his mother, appellee Ardell Williams Walcott, for his entire life. The mother and the child's natural father, appellant Leon Webster Quilloin, never married each other or established a home together, and in September 1967 the mother married appellee Randall Walcott.[1] In March 1976, she consented to adoption of the child by her husband, who immediately filed a petition for adoption. Appellant attempted to block the adoption and to secure visitation rights, but he did not seek custody or object to the child's continuing to live with appellees. Although appellant was not found to be an unfit parent, the adoption was granted over his objection.

In *Stanley* v. *Illinois*, 405 U. S. 645 (1972), this Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particular-

[1] The child lived with his maternal grandmother for the initial period of the marriage, but moved in with appellees in 1969 and lived with them thereafter.

ized finding that the father was an unfit parent. The Court concluded, on the one hand, that a father's interest in the "companionship, care, custody, and management" of his children is "cognizable and substantial," *id.*, at 651–652, and, on the other hand, that the State's interest in caring for the children is *"de minimis"* if the father is in fact a fit parent, *id.*, at 657–658. *Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial.

I

Generally speaking, under Georgia law a child born in wedlock cannot be adopted without the consent of each living parent who has not voluntarily surrendered rights in the child or been adjudicated an unfit parent.[2] Even where the child's parents are divorced or separated at the time of the adoption proceedings, either parent may veto the adoption. In contrast, only the consent of the mother is required for adoption of an illegitimate child. Ga. Code § 74–403 (3) (1975).[3] To

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[2] See Ga. Code §§ 74–403 (1), (2) (1975). Section 74–403 (1) sets forth the general rule that "no adoption shall be permitted except with the written consent of the living parents of a child." Section 74–403 (2) provides that consent is not required from a parent who (1) has surrendered rights in the child to a child-placing agency or to the adoption court; (2) is found by the adoption court to have abandoned the child, or to have willfully failed for a year or longer to comply with a court-imposed support order with respect to the child; (3) has had his or her parental rights terminated by court order, see Ga. Code § 24A–3201; (4) is insane or otherwise incapacitated from giving consent; or (5) cannot be found after a diligent search has been made.

[3] Section 74–403 (3), which operates as an exception to the rule stated in § 74–403 (1), see n. 2, *supra*, provides:

"Illegitimate children.—If the child be illegitimate, the consent of the mother alone shall suffice. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed

acquire the same veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging the child as his own, § 74–101, or by obtaining a court order declaring the child legitimate and capable of inheriting from the father, § 74–103.[4] But unless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives, § 74–203,[5] including the power to veto adoption of the child.

Appellant did not petition for legitimation of his child at any time during the 11 years between the child's birth and the filing of Randall Walcott's adoption petition.[6] However, in

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child-placing agency, or to the State Department of Family and Children Services."

Sections of Ga. Code (1975) will hereinafter be referred to merely by their numbers.

[4] Section 74–103 provides in full:

"A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

[5] Section 74–203 states:

"The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal power."

In its opinion in this case, the Georgia Supreme Court indicated that the word "paternal" in the second sentence of this provision is the result of a misprint, and was instead intended to read "parental." See 238 Ga. 230, 231, 232 S. E. 2d 246, 247 (1977).

[6] It does appear that appellant consented to entry of his name on the child's birth certificate. See § 88–1709 (d)(2). The adoption petition gave the name of the child as "Darrell Webster Quilloin," and appellant

response to Walcott's petition, appellant filed an application for a writ of habeas corpus seeking visitation rights, a petition for legitimation, and an objection to the adoption.[7] Shortly thereafter, appellant amended his pleadings by adding the claim that §§ 74–203 and 74–403 (3) were unconstitutional as applied to his case, insofar as they denied him the rights granted to married parents, and presumed unwed fathers to be unfit as a matter of law.

The petitions for adoption, legitimation, and writ of habeas corpus were consolidated for trial in the Superior Court of Fulton County, Ga. The court expressly stated that these matters were being tried on the basis of a consolidated record to allow "the biological father . . . a right to be heard with respect to any issue or other thing upon which he desire[s] to be heard, including his fitness as a parent . . . ."[8] After receiving extensive testimony from the parties and other wit-

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alleges in his brief that the child has always been known by that name, see Brief for Appellant 11.

[7] Appellant had been notified by the State's Department of Human Resources that an adoption petition had been filed.

[8] *In re: Application of Randall Walcott for Adoption of Child*, Adoption Case No. 8466 (Ga. Super. Ct., July 12, 1976), App. 70.

Sections 74–103, 74–203, and 74–403 (3) are silent as to the appropriate procedure in the event that a petition for legitimation is filed after an adoption proceeding has already been initiated. Prior to this Court's decision in *Stanley* v. *Illinois*, 405 U. S. 645 (1972), and without consideration of potential constitutional problems, the Georgia Supreme Court had concluded that an unwed father could not petition for legitimation after the mother had consented to an adoption. *Smith* v. *Smith*, 224 Ga. 442, 445–446, 162 S. E. 2d 379, 383–384 (1968). But cf. *Clark* v. *Buttry*, 226 Ga. 687, 177 S. E. 2d 89 (1970), aff'g 121 Ga. App. 492, 174 S. E. 2d 356. However, the Georgia Supreme Court had not had occasion to reconsider this conclusion in light of *Stanley*, and, in the face of appellant's constitutional challenge to §§ 74–203, 74–403 (3), the trial court evidently concluded that concurrent consideration of the legitimation and adoption petitions was consistent with the statutory provisions. See also Tr. of Hearing before Superior Court, App. 34, 51; n. 12, *infra*.

nesses, the trial court found that, although the child had never been abandoned or deprived, appellant had provided support only on an irregular basis.[9] Moreover, while the child previously had visited with appellant on "many occasions," and had been given toys and gifts by appellant "from time to time," the mother had recently concluded that these contacts were having a disruptive effect on the child and on appellees' entire family.[10] The child himself expressed a desire to be adopted by Randall Walcott and to take on Walcott's name,[11] and the court found Walcott to be a fit and proper person to adopt the child.

On the basis of these findings, as well as findings relating to appellees' marriage and the mother's custody of the child for all of the child's life, the trial court determined that the proposed adoption was in the "best interests of [the] child." The court concluded, further, that granting either the legitimation or the visitation rights requested by appellant would not be in the "best interests of the child," and that both should consequently be denied. The court then applied §§ 74–203 and 74–403 (3) to the situation at hand, and, since appellant had failed to obtain a court order granting legitimation, he was found to lack standing to object to the adoption.

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[9] Under § 74–202, appellant had a duty to support his child, but for reasons not appearing in the record the mother never brought an action to enforce this duty. Since no court ever ordered appellant to support his child, denial of veto authority over the adoption could not have been justified on the ground of willful failure to comply with a support order. See n. 2, *supra*.

[10] In addition to Darrell, appellees' family included a son born several years after appellees were married. The mother testified that Darrell's visits with appellant were having unhealthy effects on both children.

[11] The child also expressed a desire to continue to visit with appellant on occasion after the adoption. The child's desire to be adopted, however, could not be given effect under Georgia law without divesting appellant of any parental rights he might otherwise have or acquire, including visitation rights. See § 74–414.

Ruling that appellant's constitutional claims were without merit, the court granted the adoption petition and denied the legitimation and visitation petitions.

Appellant took an appeal to the Supreme Court of Georgia, claiming that §§ 74–203 and 74–403 (3), as applied by the trial court to his case, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In particular, appellant contended that he was entitled to the same power to veto an adoption as is provided under Georgia law to married or divorced parents and to unwed mothers, and, since the trial court did not make a finding of abandonment or other unfitness on the part of appellant, see n. 2, *supra*, the adoption of his child should not have been allowed.

Over a dissent which urged that § 74–403 (3) was invalid under *Stanley* v. *Illinois*, the Georgia Supreme Court affirmed the decision of the trial court. 238 Ga. 230, 232 S. E. 2d 246 (1977).[12] The majority relied generally on the strong state policy of rearing children in a family setting, a policy which in the court's view might be thwarted if unwed fathers were required to consent to adoptions. The court also emphasized the special force of this policy under the facts of this case, pointing out that the adoption was sought by the child's stepfather, who was part of the family unit in which the child was

[12] The Supreme Court addressed itself only to the constitutionality of the statutes as applied by the trial court and thus, at least for purposes of this case, accepted the trial court's construction of §§ 74–203 and 74–403 (3) as allowing concurrent consideration of the adoption and legitimation petitions. See n. 8, *supra*.

Subsequent to the Supreme Court's decision in this case, the Georgia Legislature enacted a comprehensive revision of the State's adoption laws, which became effective January 1, 1978. 1977 Ga. Laws 201. The new law expressly gives an unwed father the right to petition for legitimation subsequent to the filing of an adoption petition concerning his child. See Ga. Code § 74–406 (1977 Supp.). The revision also leaves intact §§ 74–103 and 74–203, and carries forward the substance of § 74–403 (3), and thus appellant would not have received any greater protection under the new law than he was actually afforded by the trial court.

in fact living, and that the child's natural father had not taken steps to support or legitimate the child over a period of more than 11 years. The court noted in addition that, unlike the father in *Stanley*, appellant had never been a *de facto* member of the child's family unit.

Appellant brought this appeal pursuant to 28 U. S. C. § 1257 (2), continuing to challenge the constitutionality of §§ 74–203 and 74–403 (3) as applied to his case, and claiming that he was entitled as a matter of due process and equal protection to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent. In contrast to appellant's somewhat broader statement of the issue in the Georgia Supreme Court, on this appeal he focused his equal protection claim solely on the disparate statutory treatment of his case and that of a married father.[13] We noted probable jurisdiction, 431 U. S. 937 (1977), and we now affirm.

II

At the outset, we observe that appellant does not challenge the sufficiency of the notice he received with respect to the adoption proceeding, see n. 7, *supra*, nor can he claim that he was deprived of a right to a hearing on his individualized interests in his child, prior to entry of the order of adoption. Although the trial court's ultimate conclusion was that appellant lacked standing to object to the adoption, this conclusion was reached only after appellant had been afforded a full hearing on his legitimation petition, at which he was given the opportunity to offer evidence on any matter he thought relevant, including his fitness as a parent. Had the trial court

[13] In the last paragraph of his brief, appellant raises the claim that the statutes make gender-based distinctions that violate the Equal Protection Clause. Since this claim was not presented in appellant's jurisdictional statement, we do not consider it. This Court's Rule 15 (1)(c); see, *e. g.*, *Phillips Chem. Co.* v. *Dumas School Dist.*, 361 U. S. 376, 386, and n. 12 (1960).

granted legitimation, appellant would have acquired the veto authority he is now seeking.

The fact that appellant was provided with a hearing on his legitimation petition is not, however, a complete answer to his attack on the constitutionality of §§ 74–203 and 74–403 (3). The trial court denied appellant's petition, and thereby precluded him from gaining veto authority, on the ground that legitimation was not in the "best interests of the child"; appellant contends that he was entitled to recognition and preservation of his parental rights absent a showing of his "unfitness." Thus, the underlying issue is whether, in the circumstances of this case and in light of the authority granted by Georgia law to married fathers, appellant's interests were adequately protected by a "best interests of the child" standard. We examine this issue first under the Due Process Clause and then under the Equal Protection Clause.

A

Appellees suggest that due process was not violated, regardless of the standard applied by the trial court, since any constitutionally protected interest appellant might have had was lost by his failure to petition for legitimation during the 11 years prior to filing of Randall Walcott's adoption petition. We would hesitate to rest decision on this ground, in light of the evidence in the record that appellant was not aware of the legitimation procedure until after the adoption petition was filed.[14] But in any event we need not go that far, since under the circumstances of this case appellant's substantive rights were not violated by application of a "best interests of the child" standard.

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[14] At the hearing in the trial court, the following colloquy took place between appellees' counsel and appellant:

"Q Had you made any effort prior to this time [prior to the instant proceedings], during the eleven years of Darrell's life to legitimate him?

"A . . . I didn't know that was process even you went through [*sic*]." App. 58.

We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, *e. g., Wisconsin* v. *Yoder,* 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois, supra; Meyer* v. *Nebraska,* 262 U. S. 390, 399–401 (1923). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944). And it is now firmly established that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632, 639–640 (1974).

We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith* v. *Organization of Foster Families,* 431 U. S. 816, 862–863 (1977) (STEWART, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child."

B

Appellant contends that even if he is not entitled to prevail as a matter of due process, principles of equal protection require that his authority to veto an adoption be measured by

the same standard that would have been applied to a married father. In particular, appellant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the State acted impermissibly in treating his case differently. We think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father.

Although appellant was subject, for the years prior to these proceedings, to essentially the same child-support obligation as a married father would have had, compare § 74–202 with § 74–105 and § 30–301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.

For these reasons, we conclude that §§ 74–203 and 74–403 (3), as applied in this case, did not deprive appellant of his asserted rights under the Due Process and Equal Protection Clauses. The judgment of the Supreme Court of Georgia is, accordingly,

Affirmed.

BROWDER *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76–5325. Argued October 31, 1977—Decided January 10, 1978

After unsuccessful efforts to overturn his state-court conviction on direct appeal and state collateral attack, petitioner sought a writ of habeas corpus in a Federal District Court, which on October 21, 1975, ordered his release from respondent Corrections Director's custody unless the State retried him within 60 days. The court held no evidentiary hearing, but based its order on the habeas corpus petition, respondent's "motion to dismiss," and the state-court record. Twenty-eight days after entry of the order, respondent moved for a stay of the conditional release order and for an evidentiary hearing. The District Court granted the motion, but after a hearing ruled on January 26, 1976, that the writ of habeas corpus was properly issued. Respondent immediately filed a notice of appeal seeking review of both the October 21 and January 26 orders, and the Court of Appeals reversed. Federal Rule App. Proc. 4 (a) and 28 U. S. C. § 2107 require that a notice of appeal in a civil case be filed within 30 days of entry of the judgment or order from which the appeal is taken, but under Rule 4 (a) the running of time for filing an appeal may be tolled by a timely motion filed in the district court pursuant to Fed. Rule Civ. Proc. 52 (b) or 59. *Held:* The Court of Appeals lacked jurisdiction to review the original October 21 order because respondent's motion for a stay and an evidentiary hearing (in essence a motion for rehearing or reconsideration) was untimely under Rule 52 (b) or 59 and hence could not toll the running of the "mandatory and jurisdictional" 30-day time limit of Rule 4 (a). Pp. 264–271.

(a) The October 21 order was final for purposes of 28 U. S. C. § 2253, which provides for an appeal in a habeas corpus proceeding from a "final order." The District Court discharged its duty under 28 U. S. C. § 2243 "summarily [to] hear and determine the facts" by granting the habeas corpus petition on the state-court record, and the absence of an evidentiary hearing, whether error or not, did not render the release order nonfinal. Pp. 265–267.

(b) Habeas corpus is a civil proceeding, and Rules 52 (b) and 59 were applicable. While the procedures set forth in the habeas corpus

statutes apply during the pendency of such a proceeding and Fed. Rule Civ. Proc. 81 (a) (2) recognizes the supremacy of such procedures over the Federal Rules, the habeas corpus statutes say nothing about the proper method for obtaining correction of asserted errors after judgment, whether on appeal or in the district court. Accordingly, the timeliness of respondent's post-judgment motion was governed by Rule 52 (b) or 59. Pp. 267–271.

534 F. 2d 331, reversed.

POWELL, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which REHNQUIST, J., joined, *post*, p. 272.

Kenneth N. Flaxman argued the cause for petitioner. With him on the briefs were *John M. Kalnins, Thomas R. Meites,* and *Frederick H. Weisberg.*

Raymond McKoski, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, and *Donald B. Mackay* and *Melbourne A. Noel, Jr.,* Assistant Attorneys General.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case requires us to decide whether the Court of Appeals lacked jurisdiction to review an order directing petitioner's discharge from respondent's custody because respondent's appeal was untimely. In order to resolve this question, we must consider the applicability of Federal Rules of Civil Procedure 52 (b) and 59 in habeas corpus proceedings. Because we conclude that the Court of Appeals lacked jurisdiction, we reverse.[1]

**David Goldberger* and *Joel Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Howard Eglit filed a brief for the Chicago Council of Lawyers as *amicus curiae.*

[1] In light of this disposition, it is unnecessary to reach any of the other questions presented. In addition to his jurisdictional point, petitioner contended that the Court of Appeals erred in finding the facts *de novo* on the issue of probable cause and in concluding that petitioner's

I

On January 29, 1971, a teenage girl reported to Chicago police that she had been raped. She gave a physical description of her assailants to one officer and told another officer that one of her attackers was named "Browder," was about 17 years old, and lived in the 4000 block of West Monroe. On the basis of this information and further investigation, the police focused on petitioner's brother, Tyrone Browder, whose name was in the files of the Youth Division of the Chicago Police Department. A telephone conversation between a Youth Division officer and Mrs. Lucille Browder shifted the officers' suspicions from Tyrone to petitioner, and Mrs. Browder agreed to keep both her sons at home until the police arrived to talk to them. Four officers interviewed petitioner and his brother, both of whom denied knowledge of the rape. The officers arrested the brothers along with two other teenage Negro males who were present at the Browder home. The four arrestees were taken to the police station, where another officer noticed that petitioner fit the description of the assailant in a rape that had taken place on January 30. In separate lincups, each complainant identified petitioner as her assailant. After being informed of his rights as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), petitioner confessed

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arrest was lawful. On the latter point, petitioner maintained that the arrest of four youths in the Browder home violated the Fourth and Fourteenth Amendments' requirement of probable cause, *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and, even assuming the existence of probable cause, that the Fourth and Fourteenth Amendments required the police to obtain an arrest warrant before entering the Browder home to make the arrests. The parties also have disputed whether litigation of petitioner's Fourth Amendment claim on federal habeas corpus was barred either by *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), or by *Stone* v. *Powell*, 428 U. S. 465 (1976). Finally, petitioner questioned the validity of the Seventh Circuit's "unpublished opinion" rule. We leave these questions to another day.

to the second rape but denied having committed the rape on January 29.

At his trial for the January 30 rape, petitioner moved unsuccessfully to suppress the lineup identification and the confession on grounds unrelated to the lawfulness of his arrest, which petitioner did not challenge. On direct appeal, however, petitioner argued that the identification and confession were the fruits of an unlawful arrest, effected without probable cause and without a warrant. The Illinois intermediate appellate court invoked its contemporaneous-objection rule and held that petitioner had waived this claim. Petitioner's efforts to obtain review of this claim on direct appeal to the Illinois Supreme Court and on state collateral attack fared no better.

Petitioner met with success at last when he petitioned for a writ of habeas corpus in Federal District Court. On October 21, 1975, the District Court issued an opinion and order directing that petitioner be released from custody unless the State retried him within 60 days. The court did not hold an evidentiary hearing, but it found on the basis of the petition, the respondent's "motion to dismiss," [2] and the state-court record that the police lacked probable cause to arrest petitioner on the evening of January 31, 1971. Unable to conclude that the taint of the unlawful arrest had been dissipated when the identification and confession were obtained, the court held that both were inadmissible.[3]

On November 18, or 28 days after entry of the District

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[2] Respondent moved to dismiss the habeas corpus petition for "failure to state a claim upon which relief may be granted, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure." Respondent did not base his "motion to dismiss" solely on petitioner's waiver of his claim of unlawful arrest; respondent also addressed the merits of the Fourth Amendment claim.

[3] The District Court held that petitioner's failure to raise the issue at trial did not bar habeas corpus relief because it found, citing *Fay* v. *Noia*, 372 U. S. 391 (1963), that the failure was not the result of a deliberate tactical decision to forgo the claim.

Court's order, respondent filed with the District Court a motion "to Further Stay the Execution of the Writ of Habeas Corpus and to Conduct an Evidentiary Hearing." Respondent submitted that the state-court record was inadequate and that the District Court had "erred in granting the writ without first conducting an evidentiary hearing to determine if in fact petitioner was arrested without probable cause and if so, whether his confession was thereby tainted." App. 118. Respondent cited *Townsend* v. *Sain*, 372 U. S. 293 (1963), and *United States ex rel. McNair* v. *New Jersey*, 492 F. 2d 1307 (CA3 1974), as authority for his asserted right to an evidentiary hearing, but did not identify the source of the court's authority to consider the motion.

The District Court nevertheless entertained the motion, granted a stay of execution on December 8, and on December 12 set a date for an evidentiary hearing on the issue of probable cause. The court noted that the inadequacy of the state-trial record had not been raised in respondent's "motion to dismiss" but concluded "that the request for an evidentiary hearing should not be denied solely because it is untimely."[4] App. 120. Petitioner moved immediately to vacate the orders granting a stay and an evidentiary hearing on the ground that the court lacked jurisdiction to enter them. Petitioner explained that because the period of time prescribed by the Federal Rules of Civil Procedure for a motion for a new trial or to alter or amend a judgment had elapsed,[5] the District

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[4] By untimeliness the District Court apparently meant respondent's failure to request an evidentiary hearing prior to the court's ruling on October 21. The court made no mention of the Federal Rules of Civil Procedure. The untimeliness of respondent's motion under those Rules was first mentioned in petitioner's motion to vacate the orders granting a stay and setting a date for an evidentiary hearing.

[5] A motion for a new trial may be made under Rule 59 (a). Rule 59 (b) provides that such a motion "shall be served not later than 10 days after the entry of the judgment." Similarly, "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its

Court "no longer ha[d] jurisdiction to alter or amend its final order of October 21, 1975, and the orders whose vacatur is sought are void orders." *Id.*, at 122.[6]

The evidentiary hearing was held nevertheless on January 7, 1976, and on January 26, 1976, the District Court ruled: "[T]he writ of habeas corpus was properly issued on October 21, 1975. The motion to reconsider is therefore DENIED." *Id.*, at 161. Respondent immediately filed a notice of appeal seeking review of the order of October 21 as well as the order of January 26. Petitioner maintained, consistently, that the Court of Appeals lacked jurisdiction to review the original order granting relief, since respondent's notice of appeal was not filed within 30 days of that order, and the time for appeal had not been tolled by respondent's untimely post-judgment

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findings or make additional findings and may amend the judgment accordingly." Rule 52 (b). Under Rule 59 (e), "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Since respondent neglected to label his motion, it is impossible to tell whether the motion was based on Rule 59 (a), Rule 52 (b), or Rule 59 (e). Rule 6 (b) prohibits enlargement of the time period prescribed in all of these Rules.

Because all three Rules contain the same 10-day time limit, it is unnecessary for purposes of this decision to determine whether respondent's motion should be considered a motion for a new trial, a motion to amend or make additional findings, or a motion to alter or amend the judgment. We shall refer to the motion as one for rehearing or reconsideration, for such was the essence of the relief requested. See generally *United States* v. *Dieter*, 429 U. S. 6, 8–9 (1976).

[6] Petitioner acknowledged that under Rule 60 (b), which provides for relief from judgment under certain enumerated circumstances, "a court may modify a final order granting habeas relief after the ten day limit of Rules 52 and 59"; but petitioner argued that respondent's motion was "insufficient" under Rule 60 (b). This asserted insufficiency was twofold: The motion was not made within a "reasonable time," as required by the Rule; more significantly, it did not contain allegations that would qualify for relief under any of the Rule's six categories. Respondent merely sought to convince the court that it had erred in granting relief without holding an evidentiary hearing; respondent's purpose was to introduce additional, not newly discovered, evidence.

motion. See n. 5, *supra*. Even if the order of January 26 were construed as a denial of relief from judgment under Fed. Rule Civ. Proc. 60 (b), as to which the appeal would have been timely, petitioner argued that the Court of Appeals would have jurisdiction only to review that order for abuse of discretion.[7] Respondent disclaimed reliance on Rule 60 (b), insisting instead that the order of October 21 was not a final order and that a timely appeal had been taken from the final order of January 26.[8]

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[7] Rule 60 (b), unlike Rules 52 (b) and 59, does not contain a 10-day time limit. A motion for relief from judgment under Rule 60 (b), however, does not toll the time for appeal from, or affect the finality of, the original judgment. See 7 J. Moore, Federal Practice ¶ 60.29, pp. 413–414 (1975). Thus, while the District Court lost jurisdiction 10 days after entry of the October 21 judgment to grant relief under Rule 52 (b) or 59, its power to grant relief from judgment under Rule 60 (b) still existed on January 26. A timely appeal may be taken under Fed. Rule App. Proc. 4 (a) from a ruling on a Rule 60 (b) motion. The Court of Appeals may review the ruling only for abuse of discretion, however, and an appeal from denial of Rule 60 (b) relief does not bring up the underlying judgment for review. See *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F. 2d 53 (CA2), cert. denied, 429 U. S. 862 (1976); *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F. 2d 999 (CA7 1971), cert. denied, 405 U. S. 921 (1972); 7 J. Moore, Federal Practice ¶ 60.19, p. 231; ¶ 60.30 [3], pp. 430–431 (1975).

[8] Respondent has insisted throughout this litigation that his motion for an evidentiary hearing was not based on Rule 60 (b). This position derives in part from respondent's consistently held view that until January 26, 1976, there was no final judgment from which relief could be sought or obtained, and in part from his view that the Federal Rules of Civil Procedure are not applicable in habeas corpus proceedings. It may be that respondent desired as well to avoid the force of petitioner's arguments as to the limited scope of appellate review of a district court's disposition of a Rule 60 (b) motion. See n. 7, *supra*. In any event, since respondent has represented to the Court of Appeals and to this Court that his motion was not based on Rule 60 (b), and since the District Court did not construe it as such, we find it unnecessary to address the question whether the decision of the Court of Appeals could be sustained on the theory that despite the absence of any reference to Rule 60 (b) or any of its speci-

The Court of Appeals did not address the question of its appellate jurisdiction except to observe, in a cryptic footnote, that it did not have to consider "whether there was an untimely appeal" on the issue whether petitioner's confession was admissible under *Brown* v. *Illinois*, 422 U. S. 590 (1975). The court reversed the District Court without a published opinion, holding that the police had had probable cause to arrest petitioner. Judgt. order reported at 534 F. 2d 331 (CA7 1976). Rehearing was denied. We granted certiorari. 429 U. S. 1072 (1977).

II

Under Fed. Rule App. Proc. 4 (a) and 28 U. S. C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is "mandatory and jurisdictional." *United States* v. *Robinson*, 361 U. S. 220, 229 (1960). See also *Fallen* v. *United States*, 378 U. S. 139 (1964); *Coppedge* v. *United States*, 369 U. S. 438, 442 (1962); *United States* v. *Schaefer Brewing Co.*, 356 U. S. 227 (1958); *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415 (1943); *George* v. *Victor Talking Mach. Co.*, 293 U. S. 377, 379 (1934). The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose." *Matton Steamboat, supra*, at 415.

The running of time for filing a notice of appeal may be tolled, according to the terms of Rule 4 (a), by a timely motion filed in the district court pursuant to Rule 52 (b) or Rule 59. Respondent's motion for a stay and an evidentiary hearing was filed 28 days after the District Court's order directing that petitioner be discharged. It was untimely

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fied grounds, the action of the District Court was reversible as an improper denial of relief under that Rule.

under the Civil Rules, see n. 5, *supra,* and therefore could not toll the running of time to appeal under Rule 4 (a). The Court of Appeals therefore lacked jurisdiction to review the order of October 21. But respondent answers that Rules 52 (b) and 59 do not apply because the order of October 21 was not final and, in any event, the Federal Rules of Civil Procedure did not apply in this habeas corpus proceeding.[9] We consider each of these contentions.

A

An appeal in a habeas corpus proceeding lies from a "final order," 28 U. S. C. § 2253. The District Court's order of October 21 purported to be final, as it granted petitioner's application for a writ of habeas corpus and directed that petitioner be discharged if the State did not retry him within 60 days. Respondent contends, however, that this order was not a final order " 'leaving nothing to be done but to enforce by execution what had been determined,' *Catlin* v. *United States,* 324 U. S. 229, 236 (1945), because all required procedures under the Habeas Corpus Act had not been completed at the time the order was issued." Brief for Respondent 42. Respondent cites 28 U. S. C. §§ 2243 and 2254 (d) and the Court's decision in *Townsend* v. *Sain,* 372 U. S. 293 (1963), in support of his contention that the October 21 order "cannot be considered a final order under 28 U. S. C. [§] 2253 because it left unresolved the statutorily prescribed question of whether

[9] Rule 11 of the new Federal Rules Governing 28 U. S. C. § 2254 Cases provides:

"The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules."

The new Rules are applicable to cases commenced on or after February 1, 1977. They have no bearing on the instant case, which was commenced on January 8, 1975.

It is undisputed that Fed. Rule App. Proc. 4 (a) is applicable to habeas corpus proceedings. See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1192, and n. 262 (1970)).

an evidentiary hearing would be required . . . ." Brief for Respondent 43.

Respondent's position confuses error with nonfinality and fails to distinguish between the requirements of the habeas corpus statutes and the procedural means for correcting asserted error in fulfilling the statutory command. Here the District Court discharged its duty "summarily [to] hear and determine the facts," 28 U. S. C. § 2243, by granting the petition on the state-court record. See *Walker* v. *Johnston*, 312 U. S. 275, 284 (1941).[10] Respondent's failure to assert the need for an evidentiary hearing in his motion to dismiss did not necessarily deprive him of the right to assert the absence of a hearing as a reason for reconsideration [11] or as error on appeal,[12] but neither did the absence of an evidentiary hearing render the District Court order nonfinal. If respondent

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[10] The Court stated in *Walker* v. *Johnston* that there could be situations where "on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge." 312 U. S., at 284. Several Courts of Appeals have acknowledged the power of a federal district court to discharge a habeas corpus petitioner from state custody without conducting an evidentiary hearing, when the facts are undisputed and establish a denial of petitioner's constitutional rights. *E. g., Gladden* v. *Gidley*, 337 F. 2d 575, 578 (CA9 1964) (dictum); *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135, 140 (CA2 1964) (Marshall, J.); *Dorsey* v. *Gill*, 80 U. S. App. D. C. 9, 18, 148 F. 2d 857, 866, cert. denied, 325 U. S. 890 (1945). We express no view on whether or not the District Court erred in not conducting an evidentiary hearing before issuing its order directing petitioner's conditional discharge.

[11] See, *e. g., Gladden, supra; Hunter* v. *Thomas*, 173 F. 2d 810 (CA10 1949).

[12] See, *e. g., United States ex rel. McNair* v. *New Jersey*, 492 F. 2d 1307 (CA3 1974); *United States ex rel. Mitchell* v. *Follette*, 358 F. 2d 922 (CA2 1966); *Gladden, supra*. The better procedure, of course, would be for the custodian "to indicate, in any submission asking dismissal as a matter of law, the proceedings to which it deems itself entitled if its request should be denied." *Mitchell, supra*, at 929. See also *McNair, supra*, at 1309; *Gladden, supra*, at 578.

were correct in his theory of finality, any order later alleged to have been entered precipitately or after an incomplete hearing could be considered nonfinal for purposes of appeal. The confusion that would result from litigants' divergent views of the completeness of proceedings would be wholly at odds with the imperative that jurisdictional requirements be explicit and unambiguous.

B

Since the order of October 21 was a final order, the time for appeal commenced to run on that date. Respondent's notice of appeal therefore was untimely by 68 days, unless respondent's motion of November 18 tolled the time for appeal under Rule 4 (a). The rationale behind the tolling principle of the Rule is the same as in traditional practice: "A *timely* petition for rehearing tolls the running of the [appeal] period because it operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942) (emphasis supplied). An untimely request for rehearing does not have the same effect. Respondent seeks to avoid the conclusion that his motion was untimely under the Civil Rules, and therefore did not toll the time for appeal under Appellate Rule 4 (a), by asserting that his motion was not based on Rule 52 (b) or Rule 59 because the Federal Rules of Civil Procedure were not applicable in this habeas proceeding.

Respondent's failure to rely on a particular rule in making his motion does not suffice to make the Federal Rules inapplicable. Respondent's insistence that his motion was not based on any of the Federal Rules, but rather on the habeas corpus statutes and *Townsend* v. *Sain*, *supra*, parallels his theory of the nonfinality of the October 21 order and reflects his failure to recognize that the habeas corpus statutes do not prescribe postjudgment procedures. During the pendency of

a habeas proceeding, the procedure indeed is set out in the habeas corpus statutes, and Fed. Rule Civ. Proc. 81 (a)(2) recognizes the supremacy of the statutory procedures over the Federal Rules. But those procedures say nothing about the proper method for obtaining the correction of asserted errors after judgment, whether on appeal or in the District Court.

Respondent asserts that his motion of November 18 was timely because it was filed within the 30-day period allowed for appeal, as was the case in *United States* v. *Dieter*, 429 U. S. 6 (1976). In relying upon *Dieter*, respondent misconceives our holding in that case. There the Court followed *United States* v. *Healy*, 376 U. S. 75 (1964), and held that a timely motion for rehearing in a criminal case would toll the running of the time for appeal. In *Dieter*, as in *Healy*, no rule governed the timeliness of a motion for rehearing by the Government in a criminal case or the effect of such a motion on the time allowed for appeal. Instead, " 'traditional and virtually unquestioned practice' " dictated that a timely petition for rehearing would render the original judgment nonfinal for purposes of appeal and therefore would toll the time for appeal, *Dieter*, *supra*, at 8, and n. 3 (quoting *Healy*, *supra*, at 79); and absent a rule specifying a different time limit, a petition for rehearing in a criminal case would be considered timely "when filed within the original period for review," 376 U. S., at 78. In a civil case, however, the timeliness of a motion for rehearing or reconsideration is governed by Rule 52 (b) or Rule 59, each of which allows only 10 days; [13] and

[13] Respondent's contention that the "traditional and virtually unquestioned practice" in habeas corpus proceedings contemplates an evidentiary hearing in cases like this one misunderstands the import of *Dieter* and *Healy*. The Court's resort to traditional practice in those cases was predicated explicitly on the absence of a relevant statute or rule governing the tolling of the time to appeal. It had nothing to do with the practice or procedure of the underlying criminal trial. Where, as here, a rule governs the procedure in question, the problem addressed in *Dieter* and *Healy* is absent.

Rule 4 (a) follows the "traditional and virtually unquestioned practice" in requiring that a motion be timely if it is to toll the time for appeal.

Respondent has maintained throughout that the Federal Rules of Civil Procedure are wholly inapplicable on habeas.[14] We think this is a mistaken assumption. It is well settled that habeas corpus is a civil proceeding. *Fisher* v. *Baker*, 203 U. S. 174, 181 (1906); *Ex parte Tom Tong*, 108 U. S. 556 (1883); see *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959). Perhaps in recognition of the differences between general civil litigation and habeas corpus proceedings, see *Harris* v. *Nelson*, 394 U. S. 286, 293–294, and n. 4 (1969), the Federal Rules of Civil Procedure apply in habeas proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Fed. Rule Civ. Proc. 81 (a)(2); see Fed. Rule Civ. Proc. 1.

In *Harris* the Court considered whether the discovery procedure authorized by Fed. Rule Civ. Proc. 33 is available in a habeas corpus proceeding. The Court concluded "that the intended scope of the Federal Rules of Civil Procedure and the history of habeas corpus procedure . . . make it clear that

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[14] Respondent did assume, however, that Rule 12 (b)(6) is applicable; he denominated his original response to the habeas petition a "motion to dismiss" explicitly based on that Rule. See n. 2, *supra*. Respondent's conception—which lies at the heart of his view that the lack of an evidentiary hearing rendered the order of October 21 nonfinal—seems to have been that a Rule 12 (b)(6) motion is an appropriate motion in a habeas corpus proceeding, and that upon denial of such a motion, the case should proceed through answer, discovery, and trial. This view is erroneous. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 496 (1973). The custodian's response to a habeas corpus petition is not like a motion to dismiss. The procedure for responding to the application for a writ of habeas corpus, unlike the procedure for seeking correction of a judgment, is set forth in the habeas corpus statutes and, under Rule 81 (a)(2), takes precedence over the Federal Rules.

Rule 81 (a)(2) must be read to exclude the application of Rule 33 in habeas corpus proceedings." 394 U. S., at 293. In *Thompson* v. *INS*, 375 U. S. 384 (1964), on the other hand, the Court assumed without discussion that Rules 52 (b) and 59 applied in a "proceeding for admission to citizenship" in which, as in a habeas corpus proceeding, the applicability of the Civil Rules is qualified by Rule 81 (a)(2).

Although this Court has not had occasion to hold Rules 52 (b) and 59 applicable in habeas corpus proceedings, the Courts of Appeals uniformly have so held or assumed. *E. g.*, *Rothman* v. *United States*, 508 F. 2d 648, 651 (CA3 1975); *Hunter* v. *Thomas*, 173 F. 2d 810 (CA10 1949) (motion for a new trial by the custodian). The combined application of the time limit in Rule 52 (b) or 59 and the tolling principle of Rule 4 (a) or its predecessor, Fed. Rule Civ. Proc. 73 (a), has resulted in dismissal of appeals from dispositions on habeas corpus petitions. *E. g.*, *Flint* v. *Howard*, 464 F. 2d 1084, 1086 (CA1 1972). See also *Fitzsimmons* v. *Yeager*, 391 F. 2d 849 (CA3) (en banc), cert. denied, 393 U. S. 868 (1968); *Munich* v. *United States*, 330 F. 2d 774 (CA9 1964).

We see no reason to hold to the contrary. No other statute of the United States is addressed to the timeliness of a motion to reconsider the grant or denial of habeas corpus relief, and the practice in habeas corpus proceedings before the advent of the Federal Rules of Civil Procedure conformed to the practice in other civil proceedings with respect to the correction or reopening of a judgment. At common law, a court had the power to alter or amend its own judgments during, but not after, the term of court in which the original judgment was rendered, *United States* v. *Mayer*, 235 U. S. 55, 67 (1914); *Bronson* v. *Schulten*, 104 U. S. 410, 415 (1882); *Ex parte Lange*, 18 Wall. 163, 167 (1874); *Basset* v. *United States*, 9 Wall. 38, 41 (1870); and this rule was applied in habeas corpus cases, see *Aderhold* v. *Murphy*, 103 F. 2d 492 (CA10

1939); *Tiberg* v. *Warren,* 192 F. 458, 463 (CA9 1911). The 1946 amendments to the Rules of Civil Procedure abolished terms of court and instead confined the power of a district court to alter or amend a final order to the time period stated in Rules 52 (b) and 59. See Advisory Committee Report, 5 F. R. D. 483, 486–487 (1946). "The Rules, in abolishing the term rule, did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed." *United States* v. *Smith,* 331 U. S. 469, 473 n. 2 (1947) (referring to the time limit prescribed by the Federal Rules of Criminal Procedure for new trial motions).

In addition to the settled conformity of habeas corpus and other civil proceedings with respect to time limits on post-judgment relief, the emphasis in the Federal Rules of Civil Procedure on "just" and "speedy" adjudication, see Fed. Rule Civ. Proc. 1, parallels the ideal of "a swift, flexible, and summary determination" of a habeas corpus petitioner's claim. *Preiser* v. *Rodriguez,* 411 U. S. 475, 495 (1973). See also *Fay* v. *Noia,* 372 U. S. 391, 401–402 (1963); *United States ex rel. Mattox* v. *Scott,* 507 F. 2d 919, 923 (CA7 1974); *Wallace* v. *Heinze,* 351 F. 2d 39, 40 (CA9 1965), cert. denied, 384 U. S. 954 (1966). Rule 59 in particular is based on an "interest in speedy disposition and finality," *Silk* v. *Sandoval,* 435 F. 2d 1266, 1268 (CA1), cert. denied, 402 U. S. 1012 (1971). Although some aspects of the Federal Rules of Civil Procedure may be inappropriate for habeas proceedings, see *Harris* v. *Nelson, supra; Preiser, supra,* at 495–496, the requirement of a prompt motion for reconsideration is well suited to the "special problems and character of such proceedings." *Harris* v. *Nelson, supra,* at 296. Application of the strict time limits of Rules 52 (b) and 59 to motions for reconsideration of rulings on habeas corpus petitions, then, is thoroughly consistent with the spirit of the habeas corpus statutes.

Because respondent failed to comply with these "mandatory

and jurisdictional" time limits, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion but add the comment that, under slightly altered circumstances, respondent's position might be sustained under Fed. Rule Civ. Proc. 60 (b)(1) or (6). This would be done by treating the District Court's December 8, 1975, order as an order granting relief from judgment and the post-evidentiary-hearing order dated January 26, 1976, and entered January 28, as an order reinstating judgment. With a judgment thus newly entered, respondent's notice of appeal would have been timely under Fed. Rule App. Proc. 4 (a) when it was filed on January 27. See *Edwards* v. *Louisiana*, 520 F. 2d 321 (CA5 1975), cert. denied, 423 U. S. 1089 (1976).

I would not decline to treat the matter under Rule 60 (b) merely because respondent did not *label* his initial motion for a new evidentiary hearing as a "Rule 60 (b) motion," for that would exalt nomenclature over substance. 7 J. Moore, Federal Practice ¶ 60.42, p. 903 (1975) ("[M]islabelled moving papers may be treated as a motion under 60 (b), in the absence of prejudice"). Certainly petitioner recognized in the District Court that Rule 60 (b) might provide a basis for the December 8 order; petitioner moved there unsuccessfully to vacate the order on the ground that respondent's motion did not satisfy the "reasonable time" standard or meet the substantive categories of Rule 60 (b). Petitioner's Memorandum of Law in Support of Motion to Vacate in No. 75 C 69 (ND Ill.), pp. 2–3; Brief for Petitioner in No. 76–1089 (CA7), p. 13.

The District Judge's actions, in denominating his December 8 order as one granting respondent's "motion for stay of execution of writ" and his January 28 order as one denying respondent's "motion to reconsider," are more of an obstacle.

The District Judge, though noting that respondent's motion was "untimely" (App. 120), evidently intended to permit re-examination of the issue of probable cause in light of the evidence to be presented by the State at the hearing set for January 1976. An obvious way for the District Court to permit such further examination was, of course, to set aside the original October 21 judgment under Rule 60 (b). Though the District Court made no explicit finding that the standards of Rule 60 (b)(1) or (6) were satisfied, it did deny *sub silentio* petitioner's motion disputing the applicability of those subsections. Arguably the District Judge might not have intended to set aside the October 21 judgment until and unless the January hearing turned up evidence mandating a change in the grant of habeas. But where, as here, the District Judge acted on respondent's motion to conduct an evidentiary hearing within 48 days of the original judgment—when the possibility of granting a retroactive 30-day extension of time for taking an appeal was still open—a Court of Appeals would properly be reluctant to interpret the District Judge's ambiguous succession of orders as intending to preclude full appellate review of his habeas corpus determination. Were I sitting in review on the Court of Appeals, I might well have chosen to treat the December 8 order as one granting relief from judgment.

The difficulty with effecting any such rescue of the Court of Appeals' jurisdiction over the appeal from the January 28 order, is that respondent has strenuously resisted the aid. Respondent, evidently fearing that the January 28 order would be treated as an order declining to set aside judgment under Rule 60 (b)—rather than as an order re-entering judgment which already had been set aside on December 8 under Rule 60 (b)—and fearing that the scope of review thus would be limited to determining whether there was abuse of discretion, urged in his reply brief in the Court of Appeals, p. 3, that "[i]n point of fact respondent's motion was not filed under Rule 60, but filed pursuant to . . . 28 U. S. C. [§] 2254 and

Townsend v. *Sain*, 372 U. S. 293 (1963), as is clear from the fac[e] of the motion." And to deepen the difficulty, respondent added: "Indeed it is doubtful whether Rule 60 even applies in habeas cases." *Id.*, at 4 n. 1. Even in this Court, respondent has disavowed any reliance on Rule 60 (b), evidently preferring to bank on the possibility that the Federal Rules of Civil Procedure governing timeliness would be found not to apply in federal habeas proceedings. Brief in Opposition 7; Tr. of Oral Arg. 33–34. Under these circumstances, I see no obligation on this Court's part to attempt to rescue respondent's case on a Rule 60 (b) basis.

Syllabus

ADAMO WRECKING CO. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76–911. Argued October 11, 1977—Decided January 10, 1978

The Clean Air Act authorizes the Administrator of the Environmental Protection Agency (EPA) to promulgate "emission standards" for hazardous air pollutants. The emission of an air pollutant in violation of an applicable emission standard is prohibited by § 112 (c) (1) (B), the knowing violation of which is made a criminal offense by § 113 (c) (1) (C). Section 307 (b) (1) provides that a petition for review of the Administrator's action in promulgating an emission standard may be filed only in the Court of Appeals for the District of Columbia Circuit, and under § 307 (b) (2) such action is not subject to judicial review in a civil or criminal enforcement proceeding. Petitioner was indicted for violating § 112 (c) (1) (B) for allegedly having failed while demolishing a building to comply with an EPA regulation captioned "National Emission Standard for Asbestos" and specifying that a certain procedure or "work practice" be followed in demolition of buildings containing asbestos but not limiting asbestos emissions that occur during a demolition. The District Court, finding that the cited regulation was not an "emission standard" within the meaning of § 112 (c), granted petitioner's motion to dismiss the indictment. The Court of Appeals reversed, holding that § 307 (b) precluded petitioner from questioning in a criminal enforcement proceeding whether a regulation ostensibly promulgated under § 112 (c) was in fact an emission standard. *Held:*

1. A defendant charged with a criminal violation under the Act may assert the defense that the "emission standard" with whose violation he is charged is not such a standard as Congress contemplated when it used the term even though that standard has not previously been subjected to a § 307 (b) review procedure. Such procedure does not relieve the Government of the duty of proving, in a prosecution under § 113 (c) (1) (C) that the regulation allegedly violated is an "emission standard," and a federal court in which such a prosecution is brought may determine whether or not the regulation that a defendant is alleged to have violated is an "emission standard" within the Act's meaning. From the totality of the statutory scheme, in which Congress dealt more leniently, either in terms of liability, notice, or available

defenses, with other infractions of EPA orders, but, in contrast, attached stringent sanctions to the violation of "emission standards," it is clear that Congress intended to limit "emission standards" to regulations of a certain type and did not intend to empower the Administrator of EPA to make a regulation an "emission standard" by his mere designation. *Yakus* v. *United States*, 321 U. S. 414, distinguished. Pp. 278–285.

2. The District Court did not err in holding that the regulation that petitioner was charged with violating was not an emission standard. Section 112 itself distinguishes between emission standards and techniques to be used in achieving those standards, and the language of §112 (b)(1)(B) clearly supports the conclusion that an emission standard was intended to be a quantitative limit on emissions, not a work-practice standard. Recent amendments to the Act fortify that conclusion. Pp. 285–289.

545 F. 2d 1, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 289. STEWART, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 291. STEVENS, J., filed a dissenting opinion, *post*, p. 293.

Stanley M. Lipnick argued the cause for petitioner. With him on the brief were *Burton Y. Weitzenfeld* and *Arthur L. Klein.*

Frank H. Easterbrook argued the cause *pro hac vice* for the United States. With him on the brief were *Acting Solicitor General Friedman, Acting Assistant Attorney General Moorman, Raymond N. Zagone, Patrick A. Mulloy, John J. Zimmerman,* and *Gerald K. Gleason.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Clean Air Act authorizes the Administrator of the Environmental Protection Agency to promulgate "emission standards" for hazardous air pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health." § 112 (b)(1)(B), 84 Stat. 1685, 42 U. S. C. § 1857c–7 (b)(1)(B). The emission of an air pollutant in

violation of an applicable emission standard is prohibited by § 112 (c)(1)(B) of the Act, 42 U. S. C. § 1857c–7 (c)(1)(B). The knowing violation of the latter section, in turn, subjects the violator to fine and imprisonment under the provisions of § 113 (c)(1)(C) of the Act, 42 U. S. C. § 1857c–8 (c)(1)(C) (1970 ed., Supp. V). The final piece in this statutory puzzle is § 307 (b) of the Act, 84 Stat. 1708, 42 U. S. C. § 1857h–5(b) (1970 ed., Supp. V), which provides in pertinent part:

> "(1) A petition for review of action of the Administrator in promulgating . . . any emission standard under section 112 . . . may be filed only in the United States Court of Appeals for the District of Columbia. . . . Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

It is within this legislative matrix that the present criminal prosecution arose.

Petitioner was indicted in the United States District Court for the Eastern District of Michigan for violation of § 112 (c)(1)(B). The indictment alleged that petitioner, while engaged in the demolition of a building in Detroit, failed to comply with 40 CFR § 61.22 (d)(2)(i) (1975). That regulation, described in its caption as a "National Emission Standard for Asbestos," specifies procedures to be followed in connection with building demolitions, but does not by its terms limit emissions of asbestos which occur during the course of a demolition. The District Court granted petitioner's motion to dismiss the indictment on the ground that no violation of § 112 (c)(1)(B), necessary to establish criminal liability under § 113 (c)(1)(C), had been alleged, because the cited

regulation was not an "emission standard" within the meaning of § 112 (c). The United States Court of Appeals for the Sixth Circuit reversed, 545 F. 2d 1 (1976), holding that Congress had in § 307 (b) precluded petitioner from questioning in a criminal proceeding whether a regulation ostensibly promulgated under § 112 (b)(1)(B) was in fact an emission standard. We granted certiorari, 430 U. S. 953 (1977), and we now reverse.

I

We do not intend to make light of a difficult question of statutory interpretation when we say that the basic question in this case may be phrased: "When is an emission standard not an emission standard?" Petitioner contends, and the District Court agreed, that while the preclusion and exclusivity provisions of § 307 (b) of the Act prevented his obtaining "judicial review" of an emission standard in this criminal proceeding, he was nonetheless entitled to claim that the administrative regulation cited in the indictment was actually not an emission standard at all. The Court of Appeals took the contrary view. It held that a regulation designated by the Administrator as an "emission standard," however different in content it might be from what Congress had contemplated when it authorized the promulgation of emission standards, was sufficient to support a criminal charge based upon § 112 (c), unless it had been set aside in an appropriate proceeding commenced in the United States Court of Appeals for the District of Columbia Circuit pursuant to § 307 (b).

The Court of Appeals in its opinion relied heavily on *Yakus* v. *United States*, 321 U. S. 414 (1944), in which this Court held that Congress in the context of criminal proceedings could require that the validity of regulatory action be challenged in a particular court at a particular time, or not at all. That case, however, does not decide this one. Because § 307 (b) expressly applies only to "emission standards," we must still inquire as to the validity of the Government's underlying

assumption that the Administrator's mere designation of a regulation as an "emission standard" is sufficient to foreclose any further inquiry in a criminal prosecution under § 113 (c)(1)(C) of the Act. For the reasons hereafter stated, we hold that one such as respondent who is charged with a criminal violation under the Act may defend on the ground that the "emission standard" which he is charged with having violated was not an "emission standard" within the contemplation of Congress when it employed that term, even though the "emission standard" in question has not been previously reviewed under the provisions of § 307 (b) of the Act.

II

In resolving this question, we think the statutory provisions of the Clean Air Act are far less favorable to the Government's position than were the provisions of the Emergency Price Control Act considered in *Yakus*. The broad language of that statute gave clear evidence of congressional intent that *any* actions taken by the Price Administrator under the purported authority of the designated sections of the Act should be challenged only in the Emergency Court of Appeals. Nothing has been called to our attention which would lead us to disagree with the Government's description of the judicial review provisions of that Act:

> "Review of price control regulations was centralized in the Emergency Court of Appeals under a statute giving that court 'exclusive' jurisdiction of all non-constitutional challenges to price control regulations. The Court had no difficulty construing the statute as precluding any attack on a regulation in a criminal case (321 U. S., at 430–431), even though the statute did not explicitly mention criminal cases." Brief for United States 18.

This relatively simple statutory scheme contrasts with the Clean Air Act's far more complex interrelationship between the imposition of criminal sanctions and judicial review of the

Administrator's actions. The statutory basis for imposition of criminal liability under subchapter I of the Act, under which this indictment was brought, is § 113 (c)(1), 84 Stat. 1687, as amended, 42 U. S. C. § 1857c-8 (c)(1) (1970 ed. and Supp. V):

"(c)(1) Any person who knowingly—

"(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

"(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

"(C) violates section 111 (e), section 112 (c), or section 119 (g)

"shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both."

Each of the three separate subsections in the quoted language creates criminal offenses. The first of them, subsection (A), deals with violations of applicable implementation plans after receipt of notice of such violation. Under § 307 (b)(1), judicial review of the Administrator's action in approving or promulgating an implementation plan is not restricted to the Court of Appeals for the District of Columbia Circuit, but may be had "in the United States Court of Appeals for the appropriate circuit." But § 307 (b)(2) does provide that the validity of such plans may not be reviewed in the criminal proceeding itself.

Subsection (C), which we discuss before turning to subsection (B), provides criminal penalties for violations of three

separate sections of the Act: § 111 (e), 84 Stat. 1684, 42 U. S. C. § 1857c–6 (e), which prohibits operation of new stationary sources in violation of "standards of performance" promulgated by the Administrator; § 112 (c), which is the offense charged in this case; and § 119 (g), 88 Stat. 254, 42 U. S. C. § 1857c–10 (g) (1970 ed., Supp. V),[1] which requires compliance with an assortment of administrative requirements, set out in more detail below. The Administrator's actions in promulgating "standards of performance" under § 111, or "emission standards" under § 112 are, by the provisions of § 307 (b)(1), made reviewable exclusively in the Court of Appeals for the District of Columbia Circuit. However, his actions under subsections (A), (B), and (C) of § 119 (c)(2), compliance with which is required by § 119 (g)(2), are reviewable "in the United States Court of Appeals for the appropriate circuit." Those subsections define the Administrator's authority to issue compliance date extensions to particular stationary sources with regard to various air pollution requirements. The preclusive provisions of § 307 (b)(2) prohibit challenges to all of *these* administrative actions in both civil and criminal enforcement proceedings. But these restrictive review provisions do *not* apply to *other* violations of § 119 (g); with regard to those offenses, the invalidity of administrative action may be raised as a defense to the extent allowable in the absence of such restrictions.

Finally, subsection (B) of § 113 (c)(1) subjects to criminal penalties "any person who knowingly . . . violates or fails or refuses to comply with any order issued by the Administrator under subsection (a)." Subsection (a), in turn, empowers the Administrator to issue orders requiring compliance, not only with those regulations for which criminal penalties are provided under subsections (A) and (C), but also with the record-keeping and inspection requirements of § 114, 42 U. S. C.

[1] Section 119, which was in effect at the inception of this prosecution, has lately been replaced by a new § 113 (d). Clean Air Act Amendments of 1977, Pub. L. 95–95, § 112, 91 Stat. 705.

§ 1857c–9 (1970 ed., Supp. V), for which only civil penalties are ordinarily available under § 113 (b)(4). The restrictive review provisions of § 307 (b)(1), again do *not* apply to orders issued under § 113 (a) or to the underlying requirements of § 114. Those administrative actions would likely be reviewable under the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, and any infirmity in them could be raised as a defense in enforcement proceedings to the same extent as it could be in the absence of a provision such as § 307 (b)(2).

III

The conclusion we draw from this excursion into the complexities of the criminal sanctions provided by the Act are several. First, Congress has not chosen to prescribe *either* civil or criminal sanctions for violations of *every* rule, regulation, or order issued by the Administrator. Second, Congress, as might be expected, has imposed *civil* liability for a wider range of violations of the orders of the Administrator than those for which it has imposed *criminal* liability. Third, even where Congress has imposed criminal liability for the violation of an order of the Administrator, it has not uniformly precluded judicial challenge to the order as a defense in the criminal proceeding. Fourth, although Congress has applied the preclusion provisions of § 307 (b)(2) to implementation plans approved by the Administrator, and it has in § 113 (c)(1)(A) provided criminal penalties for violations of those plans, it has nonetheless required, under normal circumstances, that a violation continue for a period of 30 days after receipt of notice of the violation from the Administrator before the criminal sanction may be imposed.

These conclusions in no way detract from the fact that Congress *has* precluded judicial review of an "emission standard" in the court in which the criminal proceeding for the violation of the standard is brought. Indeed, the conclusions heighten the importance of determining what it was that Congress meant by an "emission standard," since a violation of

that standard is subject to the most stringent criminal liability imposed by § 113 (c)(1) of the Act: Not only is the Administrator's promulgation of the standard not subject to judicial review in the criminal proceeding, but no prior notice of violation from the Administrator is required as a condition for criminal liability.[2] Since Congress chose to attach these stringent sanctions to the violation of an emission standard, in contrast to the violation of various other kinds of orders that might be issued by the Administrator, it is crucial to determine whether the Administrator's mere designation of a regulation as an "emission standard" is conclusive as to its character.

The stringency of the penalty imposed by Congress lends substance to petitioner's contention that Congress envisioned a particular type of regulation when it spoke of an "emission standard." The fact that Congress dealt more leniently, either in terms of liability, of notice, or of available defenses, with other infractions of the Administrator's orders suggests that it attached a peculiar importance to compliance with "emission standards." Unlike the situation in *Yakus*, Congress in the Clean Air Act singled out violators of this generic form of regulation, imposed criminal penalties upon them which would not be imposed upon violators of other orders of the Administrator, and precluded them from asserting defenses which might be asserted by violators of other orders of the Administrator. All of this leads us to conclude that Congress intended, within broad limits, that "emission standards" be regulations of a certain type, and that it did not empower the Administrator, after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an "emission standard" by his mere designation.

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[2] The severity of the scheme is accentuated by the fact that persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the District of Columbia to protect their interests.

The statutory scheme supports the conclusion that § 307 (b)(2), in precluding judicial review of the validity of emission standards, does not relieve the Government of the duty of proving, in a prosecution under § 113 (c)(1)(C), that the regulation allegedly violated is an emission standard. Here, the District Court properly undertook to resolve that issue. In so doing, the court did not undermine the twin congressional purposes of insuring that the substantive provisions of the standard would be uniformly applied and interpreted and that the circumstances of its adoption would be quickly reviewed by a single court intimately familiar with administrative procedures. The District Court did not presume to judge the wisdom of the regulation or to consider the adequacy of the procedures which led to its promulgation, but merely concluded that it was not an emission standard.[3]

In sum, a survey of the totality of the statutory scheme does not compel agreement with the Government's contention that Congress intended that the Administrator's designation of a regulation as an emission standard should be conclusive in a criminal prosecution. At the very least, it may be said that

[3] Such a preliminary analysis of administrative action is hardly unique. Only last Term, in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977), this Court approved such an initial examination of regulations promulgated under the Federal Water Pollution Control Act. As we described the issue presented there:

"If EPA is correct that its regulations are 'effluent limitation[s] under section 301,' the regulations are directly reviewable in the Court of Appeals. If industry is correct that the regulations can only be considered § 304 guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere. Thus, the issue of jurisdiction to review the regulations is intertwined with the issue of EPA's power to issue the regulations." *Id.*, at 124–125.

In that case, the District Court had conducted a careful analysis, concluding that the regulations in question were "effluent limitations," 383 F. Supp. 1244 (WD Va. 1974), aff'd, 528 F. 2d 1136 (CA4 1975), just as the District Court here concluded that this regulation is not an emission standard.

the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States* v. *Bass*, 404 U. S. 336, 348 (1971). Cf. *Rewis* v. *United States*, 401 U. S. 808, 812 (1971).

We conclude, therefore, that a federal court in which a criminal prosecution under § 113 (c)(1)(C) of the Clean Air Act is brought may determine whether or not the regulation which the defendant is alleged to have violated is an "emission standard" within the meaning of the Act. We are aware of the possible dangers that flow from this interpretation; district courts will be importuned, under the guise of making a determination as to whether a regulation is an "emission standard," to engage in judicial review in a manner that is precluded by § 307 (b)(2) of the Act. This they may not do. The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding. The question is only whether the regulation which the defendant is alleged to have violated is on its face an "emission standard" within the broad limits of the congressional meaning of that term.

IV

It remains to be seen whether the District Court reached the correct conclusion with regard to the regulation here in question. In the Act, Congress has given a substantial indication of the intended meaning of the term "emission standard." Section 112 on its face distinguishes between emission standards and the techniques to be utilized in achieving those standards. Under § 112 (c)(1)(B)(ii), the Administrator is empowered temporarily to exempt certain facilities

from the burden of compliance with an emission standard, "if he finds that such period is necessary for the installation of controls." In specified circumstances, the President, under § 112 (c)(2), has the same power, "if he finds that the technology to implement such standards is not available." Section 112 (b)(2) authorizes the Administrator to issue information on "pollution control techniques."

Most clearly supportive of petitioner's position that a standard was intended to be a quantitative limit on emissions is this provision of § 112 (b)(1)(B): "The Administrator shall establish any such standard *at the level* which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." (Emphasis added.) All these provisions lend force to the conclusion that a standard is a quantitative "level" to be attained by use of "techniques," "controls," and "technology." This conclusion is fortified by recent amendments to the Act, by which Congress authorized the Administrator to promulgate a "design, equipment, work practice, or operational standard" when "it is not feasible to prescribe or enforce an emission standard." Clean Air Act Amendments of 1977, Pub. L. 95–95, § 110, 91 Stat. 703.[4]

This distinction, now endorsed by Congress, between "work practice standards" and "emission standards" first appears in the Administrator's own account of the development of this regulation. Although the Administrator has contended that a "work practice standard" is just another type of emission standard, the history of this regulation demonstrates that he

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[4] Since oral argument, Congress has again confirmed that the term "emission standard" is not broad enough to include a work-practice standard. Congress has amended § 307 (b)(1), which originally governed review of "any emission standard under section 112," to cover "any emission standard or requirement under section 112." Pub. L. No. 95–190, § 14 (a)(79), 91 Stat. 1404. As MR. JUSTICE STEVENS' dissent notes, *post*, at 306, Congress has yet to apply this recognition to the enforcement provisions of § 112 (c).

chose to regulate work practices only when it became clear he could not regulate emissions. The regulation as originally proposed would have prohibited all visible emissions of asbestos during the course of demolitions. 36 Fed. Reg. 23242 (1971). In adopting the final form of the regulation, the Administrator concluded "that the no visible emission requirement would prohibit repair or demolition in many situations, since it would be impracticable, if not impossible, to do such work without creating visible emissions." 38 Fed. Reg. 8821 (1973). Therefore the Administrator chose to "specif[y] certain work practices" instead. *Ibid.*

The Government concedes that, prior to the 1977 Amendments, the statute was ambiguous with regard to whether a work-practice standard was properly classified as an emission standard, but argues that this Court should defer to the Administrator's construction of the Act.[5] Brief for United

[5] Our Brother STEVENS quite correctly points out, *post*, at 302, that an administrative " 'contemporaneous construction' " of a statute is entitled to considerable weight, and it is true that the originally proposed regulations contain, with respect to some uses of asbestos, the sort of provisions which the Administrator and the Congress later designated as "work practice standards." It bears noting, however, that these regulations can only be said to define *by implication* the meaning of the term "emission standard." The Administrator promulgated both of them; both were denominated "emission standards"; and it is undoubtedly a fair inference that the Administrator thought each to be an "emission standard." But neither the regulations themselves nor the comments accompanying them give any indication of the Administrator's reasons for concluding that Congress, in authorizing him to promulgate "emission standards," intended to include "work practice standards" within the meaning of that term. See 38 Fed. Reg. 8820–8822, 8829–8830 (1973); 36 Fed. Reg. 23239–23240, 23242 (1971).

This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944), that one factor to be considered in giving weight to an administrative ruling is "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." The Administrator's remarks with regard to

States 32, and n. 22. While such deference is entirely appropriate under ordinary circumstances, in this case the 1977 Amendments to the Clean Air Act tend to undercut the

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these regulations clearly demonstrate that he carefully considered available techniques and methods for controlling asbestos emissions, but they give no indication of "the validity of [his] reasoning" in concluding that he was authorized to promulgate these techniques as an "emission standard," within the statutory definition. Since this Court can only speculate as to his reasons for reaching that conclusion, the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks "power to persuade" as to the existence of such authority.

By contrast, the Wage and Hour Administrator in *Gemsco, Inc.* v. *Walling*, 324 U. S. 244 (1945), referred to in Brother STEVENS' dissenting opinion, *post*, at 299–300, n. 16, gave clear indication of his reasons for concluding that the administrative regulation prohibiting industrial homework was authorized by § 8 (f) of the Fair Labor Standards Act, 52 Stat. 1065. The statute empowered the Administrator to issue orders necessary "to prevent the circumvention or evasion" of orders issued under § 8 (f), and the Administrator specifically found that the practice prohibited by the order there challenged " 'furnishe[d] a ready means of circumventing or evading the minimum wage order for this Industry.' " 324 U. S., at 250, n. 9. In this case, the Administrator of the Environmental Protection Agency offered no comparable analysis of his statutory authority.

In *Train* v. *Natural Resources Defense Council*, 421 U. S. 60 (1975), relied upon by Brother STEVENS' dissent, this Court was not persuaded by "a single sentence in the Federal Register," *post*, at 301 n. 18, but by our own "analysis of the structure and legislative history of the Clean Air Amendments," 421 U. S., at 86, which led us to a result consistent with the Administrator's prior practice. Here, our analysis mandates a contrary conclusion, which is not undercut by the Administrator's unexplained exercise of supposed authority.

Finally, as noted in n. 4, *supra*, Congress has not explicitly adopted the Administrator's present position with regard to the meaning of the term "emission standard," although it could easily have done so. It is true, as that dissent remarks, *post*, at 305–306, n. 24, that Congress has responded to concerns expressed by the Administrator. However, he first advised us of the deficiency in § 307 (b) at oral argument, and even then did not suggest that under the statutory scheme as it presently exists his work-practice standards may be unenforceable. This piecemeal

administrative construction. The Senate Report reiterated its "strong preference for numerical emission limitations," but endorsed the addition of § 112 (e) to the Act to allow the use of work-practice standards "in a very few limited cases." S. Rep. No. 95–127, p. 44 (1977). Although the Committee agreed that the Amendments would authorize the regulation involved here, it refrained from endorsing the Administrator's view that the regulation had previously been authorized as an emission standard under § 112 (c). The clear distinction drawn in § 112 (e) between work-practice standards and emission standards practically forecloses any such inference. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969).

For all of the foregoing reasons, we conclude that the work-practice standard involved here was not an emission standard. The District Court's order dismissing the indictment was therefore proper, and the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, concurring.

If the constitutional validity of § 307 (b) of the Clean Air Act had been raised by petitioner, I think it would have merited serious consideration. This section limits judicial review to the filing of a petition in the United States Court of Appeals for the District of Columbia Circuit within 30 days from the date of the promulgation by the Administrator of an emission standard. No notice is afforded a party who may be subject to criminal prosecution other than publication of the Administrator's action in the Federal Register.[1] The Act in

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approach to the complexities of the Act hardly displays the "thoroughness . . . in . . . consideration," *Skidmore, supra*, at 140, which we would expect to find in an administrative construction.

[1] Section 112 (b)(1)(B) of the Act requires the Administrator to publish proposed emission standards and to hold a public hearing before standards

this respect is similar to the preclusion provisions of the Emergency Price Control Act before the Court in *Yakus* v. *United States*, 321 U. S. 414 (1944), and petitioner may have thought the decision in that case effectively foreclosed a due process challenge in the present case.

Although I express no considered judgment, I think *Yakus* is at least arguably distinguishable. The statute there came before the Court during World War II, and it can be viewed as a valid exercise of the war powers of Congress under Art. I, § 8, of the Constitution. Although the opinion of Mr. Chief Justice Stone is not free from ambiguity, there is language emphasizing that the price controls imposed by the Congress were a "war emergency measure." Indeed, the Government argued that the statute should be upheld under the war powers authority of Congress. Brief for United States in *Yakus* v. *United States*, O. T. 1943, No. 374, p. 35. As important as environmental concerns are to the country, they are not comparable—in terms of an emergency justifying the shortcutting of normal due process rights—to the need for national mobilization in wartime of economic as well as military activity.

The 30-day limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register. Indeed, following *Yakus*, and apparently concerned by Mr. Justice Rutledge's

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are promulgated. But there is no more assurance that notice of proposed standards will come to the attention of the thousands of persons and entities affected than that notice of their actual promulgation will. Neither is it realistic to assume that more than a fraction of these persons and entities could afford to follow or participate in the Administrator's hearing.

eloquent dissent, Congress amended the most onerous features of the Emergency Price Control Act.[2]

I join the Court's opinion with the understanding that it implies no view as to the constitutional validity of the preclusion provisions of § 307 (b) in the context of a criminal prosecution.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

Section 307 (b)(1) of the Clean Air Act provides that a "petition for review of action of the Administrator in promulgating . . . any emission standard under section 112" may be filed only in the United States Court of Appeals for the District of Columbia Circuit within 30 days of promulgation. Section 307 (b)(2) of the Act provides that an "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." Despite these unambiguous provisions, the Court holds in this case that such an action of the Administrator *shall* be subject to judicial review in a criminal proceeding for enforcement of the Act, at least sometimes. Because this tampering with the plain statutory language threatens to destroy the effectiveness of the unified and expedited judicial review procedure established by Congress in the Clean Air Act, I respectfully dissent.

The inquiry that the Court today allows a trial court to make—whether the asbestos regulation at issue is an emission standard of the type envisioned by Congress—is nothing more than an inquiry into whether the Administrator has acted beyond his statutory authority. But such an inquiry is a normal part of judicial review of agency action. 5 U. S. C. § 706 (2)(C); see *Citizens to Preserve Overton Park* v. *Volpe*,

[2] See 321 U. S., at 460 (Rutledge, J., dissenting); 58 Stat. 638–640, amending the Emergency Price Control Act of 1942, 56 Stat. 23; L. Jaffe, Judicial Control of Administrative Action 451 (1965).

401 U. S. 402, 415. And it is precisely such "judicial review" of an "[a]ction of the Administrator" that Congress has, in § 307 (b)(2), expressly *forbidden* a trial court to undertake. There is not the slightest indication in the Act or in its legislative history that Congress, in providing for review of the Administrator's actions only in the Court of Appeals for the District of Columbia Circuit, meant nonetheless to allow some kinds of review to be available in other courts. To the contrary, Congress clearly ordained that "*any* review of such actions" be controlled by the provisions of § 307. S. Rep. No. 91–1196, p. 41 (1970) (emphasis supplied).

The Court's interpretation of § 307 (b)(2) also conspicuously frustrates the intent of Congress to establish a speedy and unified system of judicial review under the Act. The Court concludes that violation of the regulation involved in this case is not proscribed by §§ 112 (c)(1)(B) and 113 (c)(1)(C) because the regulation is not an emission standard. This interpretation of the Act would make judicial review of this regulation in the Court of Appeals for the District of Columbia Circuit impossible, since that court has statutory jurisdiction under § 307 (b)(1) to review "emission standard[s]" but is not given jurisdiction to review the actions of the Administrator generally. It follows that judicial review of this action of the Administrator could be had *only* in other courts, either in enforcement proceedings as in this case or under the general provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, despite the clearly expressed congressional intent to centralize all judicial review of the Administrator's regulations. The Court's interpretation thus not only invites precisely the sort of inconsistent judicial determinations by various courts that Congress sought to prevent, but flies in the face of the congressional purpose "to maintain the integrity of the time sequences provided throughout the Act." S. Rep. No. 91–1196, *supra*, at 41.

Finally, the Court provides no real guidance as to which

aspects of an emission standard are so critical that they fall outside the scope of the exclusive judicial review procedure provided by Congress. For example, § 112 requires that an emission standard relate to a "hazardous air pollutant," and that it be set so as to provide "an ample margin of safety to protect the public health." Such express congressional mandates would seem at least as important in determining whether a regulation is a statutorily authorized emission standard as the supposed requirement that the regulation be numerical in form. Are issues such as these, therefore, now to be subject to review in trial court enforcement proceedings? The Court today has allowed the camel's nose into the tent, and I fear that the rest of the camel is almost certain to follow.

Since I believe that the Administrator's action in promulgating this regulation could have been reviewed in the Court of Appeals for the District of Columbia Circuit under § 307 (b)(1), and that such review could have included the petitioner's claim that the Administrator's action was beyond his authority under the Act, I would hold that the petitioner was barred by the express language of § 307 (b)(2) from raising that issue in the present case.*

MR. JUSTICE STEVENS, dissenting.

The reason Congress attached "the most stringent criminal liability," *ante*, at 283, to the violation of an emission standard for a "hazardous air pollutant" is that substances within that narrow category pose an especially grave threat to human health. That is also a reason why the Court should avoid a construction of the statute that would deny the Administrator the authority to regulate these poisonous substances effectively.

*Because the petitioner has not raised any constitutional challenge in this case, there is no occasion to consider what limits, if any, the Due Process Clause of the Fifth Amendment imposes on the power of Congress to qualify or foreclose judicial review of agency action.

The reason the Administrator did not frame the emission standard for asbestos in numerical terms is that asbestos emissions cannot be measured numerically. For that reason, if Congress simultaneously commanded him (a) to regulate asbestos emissions by establishing and enforcing emission standards and (b) never to use any kind of standard except one framed in numerical terms, it commanded an impossible task.

Nothing in the language of the 1970 statute, or in its history, compels so crippling an interpretation of the Administrator's authority. On the contrary, I am persuaded (1) that the Administrator's regulation of asbestos emissions was entirely legitimate; (2) that if this conclusion were doubtful, we would nevertheless be required to respect his reasonable interpretation of the governing statute; (3) that the 1977 Amendments, fairly read, merely clarified his pre-existing authority; and (4) that the Court's reading of the statute in its current form leads to the anomalous conclusion that work-practice rules, even though properly promulgated, are entirely unenforceable. Accordingly, although I agree with the conclusions reached in Parts I, II, and III of the Court's opinion, I cannot accept Part IV's disposition of the most important issue in this case.[1]

I

The regulation which petitioner is accused of violating requires that asbestos insulation and fireproofing in large

[1] Nor can I join MR. JUSTICE STEWART's opinion, because he does not explain what test he applies to determine that § 307 (b) precludes any challenge to the asbestos regulation in an enforcement proceeding. The preclusion provision applies only if the Administrator's action could have been reviewed in the Court of Appeals for the District of Columbia Circuit; and review was not available there unless the Administrator's "action" was the promulgation of an "emission standard" within the meaning of § 307 (b). In short, MR. JUSTICE STEWART's dissent rests either on the unarticulated premise that the asbestos regulation was an "emission standard" under § 307 (b), or on the application of a test not to be found in the language of the statute.

buildings be watered down before the building is demolished.[2] The effect of the regulation is to curtail the quantity of asbestos which is emitted into the open air during demolition. Because neither the rule nor its limiting effect is expressed in numerical terms, the Court holds that the asbestos regulation cannot be a "standard" within the meaning of § 112 (b)(1) of the Clean Air Act.[3] This conclusion is not compelled by the use of the word "standard"[4] or by Congress' expectation

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[2] The emission standard for asbestos provides, in pertinent part:

"(i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. The friable asbestos debris shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations." 40 CFR § 61.22 (d)(2)(i) (1975).

[3] Section 112 (b)(1) provides:

"(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

"(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

"(C) Any emission standard established pursuant to this section shall become effective upon promulgation." 84 Stat. 1685, 42 U. S. C. § 1857c–7 (b)(1).

[4] There is no semantic reason why the word "standard" may not be used to describe the watered-down asbestos standard involved in this case. Indeed, the Court itself has previously identified a "watered down standard" that is not expressed in numerical terms, see *Benton* v. *Maryland*, 395 U. S. 784, 796.

that standards would normally be expressed in numerical terms; for the statute contains no express requirement that standards *always* be framed in such language. The question is simply whether § 112 (b), which directs the Administrator to adopt regulations establishing emission standards for hazardous air pollutants, granted him the authority to promulgate the asbestos standard challenged in this case.

Section 112 is concerned with a few extraordinarily toxic pollutants. Only three substances, including asbestos, have been classified as "hazardous air pollutants" within the meaning of § 112.[5] These pollutants are subject to special federal regulation. In § 112, Congress ordered the Administrator to identify and to regulate them without waiting for the States to develop implementation plans of their own. Thus, the procedure under § 112 contrasts markedly with the more leisurely and decentralized process of setting and enforcing the general ambient air standards.[6] Congress was gravely concerned about the poisonous character of asbestos emissions when it drafted § 112.[7] In fact, with regard to the hazardous air pollutants covered by this section, Congress expressed its willingness to accept the prospect of plant closings: "The standards must be set to provide an ample margin of safety to protect the public health. This could mean, effectively, that a plant would be required to close because of the absence of control techniques. It could include emission standards which allowed for no measurable emissions." [8]

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[5] See 40 CFR § 61 (1975).

[6] Compare § 112, 42 U. S. C. § 1857c–7, with §§ 109 and 110, 42 U. S. C. §§ 1857c–4 and 1857c–5 (1970 ed. and Supp. V).

[7] See, *e. g.*, National Air Quality Standards Act of 1970, S. Rep. No. 91–1196, p. 20 (1970).

[8] This statement was made in a written summary of the conference agreement presented by Senator Muskie to the Senate, which then agreed to the Conference Report. Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970, reprinted in Senate Committee on Public Works, A Legislative History of the Clean Air

In accord with Congress' expectation, the Administrator promptly listed asbestos as a hazardous air pollutant,[9] and published a proposed emission standard. As first proposed, the standard would have prohibited any visible emission of asbestos in connection with various activities, including the repair or demolition of commercial and apartment buildings.[10]

If that total prohibition had been adopted, it unquestionably would have conformed to the statutory mandate. It was not adopted, however, because industry convinced the Administrator that his proposal would prevent the demolition of any large building.[11] At public hearings it was demonstrated that

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Amendments of 1970, 93d Cong., 2d Sess., 133 (Comm. Print 1974). See also *id.*, at 150.

[9] 36 Fed. Reg. 5931 (1971). The three hazardous air pollutants—asbestos, beryllium, and mercury—listed by the Administrator on March 29, 1971, were all identified in the legislative history.

The Administrator's investigation fully supported Congress' suspicion that asbestos was an intolerably dangerous pollutant. Among other risks, even low-level or intermittent exposure to asbestos can cause cancer 20 or 30 years after the event. 38 Fed. Reg. 8820 (1973). For example, a form of cancer usually found almost exclusively in asbestos workers killed a woman whose only contact with the pollutant was washing the workclothes of her children, who worked for an asbestos company. See Horvitz, Asbestos and Its Environmental Impact, 3 Environmental Affairs 145, 146 (1974).

[10] "(d) Visible emissions to the atmosphere of asbestos particulate matter resulting from the repair or demolition of any building or structure, other than a single-family dwelling are prohibited." 36 Fed. Reg. 23242 (1971).

[11] The Administrator explained:

"The proposed standard would have prohibited visible emissions of asbestos particulate material from the repair or demolition of any building or structure other than a single-family dwelling. Comments indicated that the no visible emission requirement would prohibit repair or demolition in many situations, since it would be impracticable, if not impossible, to do such work without creating visible emissions. Accordingly, the promulgated standard specifies certain work practices which must be followed when demolishing certain buildings or structures. The standard covers institutional, industrial, and commercial buildings or structures, including apartment houses having more than four dwelling units, which contain friable asbestos material." 38 Fed. Reg. 8821 (1973).

demolition inevitably causes some emission of particulate asbestos and, further, that these emissions cannot be measured. Accordingly, instead of the severe numerical standard of zero emissions—which might have put an entire industry out of business—the Administrator adopted a standard which would reduce the emission of asbestos without totally prohibiting it. Not a word in the Administrator's long and detailed explanation of the standard indicates that anyone questioned his statutory authority to promulgate this type of emission standard.[12]

The promulgated standard is entirely consistent with congressional intent. Congress had indicated a preference for numerical emission standards.[13] Congress had also expressed a willingness to accept the serious economic hardships that a total prohibition of asbestos emissions would have caused. But there is no evidence that Congress intended to require the Administrator to make a choice between the extremes of closing down an entire industry and imposing no regulation on the emission of a hazardous pollutant; Congress expressed no overriding interest in using a numerical standard when industry is able to demonstrate that a less drastic control tech-

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[12] There was no review of the emission standard for asbestos in the United States Court of Appeals for the District of Columbia Circuit. An untimely petition for review was dismissed without any decision on the merits. *Dore Wrecking Co.* v. *Fri*, No. 73–1686 (CADC, Aug. 1, 1973). Contrary to the implication in n. 2 of the Court's opinion, this case does not raise any question about fair notice to small businesses. The wrecking company prosecuted here was individually notified about the wetting requirement and individually responded to the notice by promising to comply fully with the regulation on all future jobs. Indeed, the company's response specifically named the location, where, according to the indictment, it subsequently committed a knowing violation of the regulation.

[13] Congress apparently believed that too frequent resort to work-practice rules or equipment specifications would discourage the private market's pursuit of "the most economic, acceptable technique to apply." S. Rep. No. 91–1196, at 17.

nique is available,[14] and that it provides an ample margin of safety to the public health.[15]

Admittedly, Congress did not foresee the Administrator's dilemma with precision. But there is nothing unique about that circumstance. See, *e. g., Mourning* v. *Family Publications Serv., Inc.,* 411 U. S. 356, 372–373. Indeed, there would be no need for interstitial administrative lawmaking if Congress could foresee every ramification of laws as complex as this.[16] I am persuaded that the Administrator's solution

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[14] A summary of the conference agreement states that § 112 "could mean, effectively, that a plant would be required to close because of the absence of control techniques." See text accompanying n. 8, *supra.* This statement implies that the Administrator should avoid setting emission standards that will require plant closings if alternative control techniques—including work-practice rules—can provide an ample margin of safety. It is unlikely that Congress intended, by expressing a modest preference for numerical standards, see n. 11, *supra,* to mandate plant closings under a numerical standard when a work-practice rule would achieve the same level of protection with less economic disruption.

[15] "[T]he Administrator has determined that, in order to provide an ample margin of safety to protect the public health from asbestos, it is necessary to control emissions from major man-made sources of asbestos emissions into the atmosphere, but that it is not necessary to prohibit all emissions." 38 Fed. Reg. 8820 (1973).

[16] In *Gemsco, Inc.* v. *Walling,* 324 U. S. 244, this Court approved a much more dubious substitute for a regulation that Congress surely expected to be framed in numerical terms. In that case the Administrator of the Fair Labor Standards Act decided to ban industrial homework as a way of enforcing the minimum wage. If homework were allowed to continue, the Administrator concluded, industry could readily evade wage standards. Although the Administrator lacked any express authority to regulate industrial homework, this Court approved his action, saying:

"The industry is covered by the Act. This is not disputed. The intent of Congress was to provide the authorized minimum wage for each employee so covered. Neither is this questioned. Yet it is said in substance that Congress at the same time intended to deprive the Administrator of the only means available to make its mandate effective. The construction sought would make the statute a dead letter in this industry.

"The statute itself thus gives the answer. It does so in two ways, by

was faithful to his statutory authority and that he would have misused his power if he had either failed to regulate asbestos emissions at all or unnecessarily demolished an entire industry.

II

The precise question presented to this Court is not whether, as an initial matter, we would regard the asbestos regulation as an "emission standard" within the meaning of § 112. Rather, the issue is whether the Administrator's answer to the question of statutory construction is "sufficiently reasonable that it should have been accepted by the reviewing courts." *Train* v. *Natural Resources Defense Council*, 421 U. S. 60, 75.

The Administrator, who has primary responsibility for carrying out the purposes of the Clean Air Act, interpreted the term "emission standard" to include the rule before us. Contrary to the Court's implication, *ante*, at 287, the Administrator did not promulgate this rule "instead" of an emission standard. He unambiguously concluded that the rule was a proper emission standard.[17]

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necessity to avoid self-nullification and by its explicit terms. The necessity should be enough. But the Act's terms reinforce the necessity's teaching. Section 8 (d) requires the Administrator to 'carry into effect' the committee's approved recommendations. Section 8 (f) commands him to include in the order 'such terms and conditions' as he 'finds necessary to carry out' its purposes. . . . When command is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it." *Id.*, at 254–255.

In the present case, necessity also demanded the promulgation of a work-practice rule if Congress' purposes were to be carried out at a cost acceptable to the Nation. Furthermore, the Administrator of the Environmental Protection Agency has similar powers "to prescribe such regulations as are necessary to carry out his functions under this chapter." § 301, 42 U. S. C. § 1857g (a).

[17] In promulgating the wetting requirement, the Administrator consistently referred to it as an emission standard:

"[T]he promulgated standard specifies certain work practices which must

Because the statute is the Administrator's special province, we should not lightly set aside his judgment. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" *Udall* v. *Tallman*, 380 U. S. 1, 16.[18]

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be followed when demolishing certain buildings or structures. The standard covers institutional, industrial, and commercial buildings or structures . . . . The standard requires that the Administrator be notified at least 20 days prior to the commencement of demolition." 38 Fed. Reg. 8821 (1973).

[18] In a recent case dealing with the proper construction of the Clean Air Act, the Court deferred to the view of the Administrator:

"Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts." *Train* v. *Natural Resources Defense Council*, 421 U. S. 60, 75.

See also *McLaren* v. *Fleischer*, 256 U. S. 477, 480–481. The Court rejects the Administrator's view because his "mere promulgation of a regulation" lacks power to persuade. *Ante*, at 288 n. 5. We have not previously required that judicial-style opinions accompany administrative actions or interpretations. In *Train*, *supra*, the Court deferred to the Administrator's interpretation of the Clean Air Act even though his interpretation had been rejected by every Circuit to consider it, 421 U. S., at 72, and even though the interpretation was expressed and "supported" only by a single sentence in the Federal Register. 36 Fed. Reg. 22398, 22405 (1971). The Court's "own 'analysis of the structure and legislative history,'" *ante*, at 288 n. 5, was limited to answering the question whether the Administrator's construction was "sufficiently reasonable" to be permissible. 421 U. S., at 75. Similarly, in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, the Court deferred to an administrative *practice* that apparently was formally justified only after the practice was challenged in court. *Id.*, at 311, 314–315.

The Administrator began the process of promulgating this rule within weeks of § 112's enactment, 36 Fed. Reg. 23242 (1971). The wise teaching of Mr. Justice Cardozo, who spoke for the Court in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, is therefore directly pertinent. He observed that an administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.*, at 315.

The Court holds that these well-established doctrines apply only in "ordinary circumstances." *Ante*, at 288. I do not understand why these rules of construction should be less applicable in the unusual than in the ordinary case. Indeed, it seems to me that the extraordinary importance of regulating a hazardous air pollutant in a way that is both fair and effective provides an additional reason for respecting the Administrator's reliance on well-established doctrine, rather than a reason for reaching out to undermine his authority.[19]

In the Court's view, however, the enactment of amendments to the Clean Air Act in 1977 was an extraordinary circum-

[19] There is even more reason than usual to defer to the Administrator in the present case. Here we must decide whether the asbestos-wetting regulation is an emission standard within the meaning of a statute that allows prompt appellate review of such standards in a single court and precludes later challenges. § 307 (b), 42 U. S. C. § 1857h–5 (b) (1970 ed., Supp. V). Congress clearly wanted speedy, uniform, and final review of hazardous emission standards. Because this regulation is an attempt to control hazardous emissions on a nationwide basis, the need for speedy, uniform, and final review is just as great here as in the case of a numerical standard. If the reasons set forth in Part IV of the Court's opinion are sufficient to sustain a collateral attack on this regulation, the preclusion statute has become almost meaningless. Of course, I do not suggest that the Administrator may take advantage of preclusion by simply "deeming" a regulation an emission standard. But when his characterization is challenged, we should try to understand the reason for the characterization before assuming that it was the product of a "Humpty Dumpty" thought process. See *ante*, at 283.

stance that justifies a departure from settled principles. The Court takes the novel position that the Administrator's construction of the 1970 Amendments may be ignored because the legislative history of the 1977 Amendments did not produce an explicit endorsement of his construction. In my judgment this holding places an unwise limit on the deference which should be accorded to administrators' interpretations of the statutes they enforce. It also misreads the history of the 1977 Amendments.

III

The Court's conclusion ultimately rests on the 1977 Amendments. Even accepting the dubious premise that we can rely on the 95th Congress to tell us what the 93d had in mind, the 1977 Amendments do not support the Court's interpretation of the statute.

The history of the Amendments is instructive. In late 1974, several wrecking companies successfully challenged indictments brought against them in the Northern District of Illinois for violating the wetting requirements.[20] Six weeks after the first court ruling, the Administrator proposed an amendment that would expressly confirm his authority to establish design, equipment, or work-practice standards when numerical emission limitations were not feasible.[21] A major bill to amend the Clean Air Act was proposed in the 94th Congress, but the House and Senate were unable to agree. In 1977, the Senate again proposed a major revision. It included the Administrator's requested authorization. S. Rep.

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[20] See *United States* v. *National Wrecking Co.*, No. 74 CR 755 (Dec. 20, 1974); *United States* v. *Nardi Wrecking Co.*, No. 74 CR 756 (Jan. 2, 1975); *United States* v. *Harvey Wrecking Co.*, No. 74 CR 758 (Jan. 7, 1975); *United States* v. *Brandenburg Demolition, Inc.*, No. 74 CR 757 (Jan. 31, 1975).

[21] Letter from Environmental Protection Agency Administrator to Senate Public Works Committee Chairman supporting proposed amendments to the Clean Air Act (Feb. 3, 1975), excerpted in Brief for United States, App. C.

No. 95–127, p. 163. The Senate Report does not indicate whether the Senators considered the Illinois decisions correct or incorrect. *Id.*, at 44. However, as introduced in the Senate, the bill clearly provided that a design, equipment, or operational standard was a species of "hazardous emission standard." [22]

When the bill emerged from conference, it no longer expressly stated that a work-practice rule was an emission standard. This change therefore lends support to the Court's view. But it is most unlikely that the Conference Committee intended to express indirect disapproval of the Administrator's reading of the 1970 Amendments. The Conference Report explained that the change in language was merely intended to "clarify" an aspect of the Senate version which was unrelated to the question whether a work-practice rule is, or had been a species of emission standard.[23]

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[22] The bill provided, in relevant part:

"(e) For purposes of this section the Administrator may promulgate a hazardous emission standard in terms of a design, equipment, or operational standard if he determines that such standard is necessary to control emissions of a hazardous pollutant or pollutants because, in the judgment of the Administrator, they cannot or should not be emitted through a conveyance designed and constructed to emit or capture such pollutants." S. Rep. No. 95–127, p. 163 (1977).

[23] The Conference Report characterized the original Senate version as follows:

"Amends section 112 of existing law to specify design, equipment, or operational standards for the control of a source of hazardous emissions, where an emission limitation is not possible or feasible to measure hazardous emissions or to capture them through appropriate devices for control." H. R. Conf. Rep. No. 95–564, p. 131 (1977).

It described the conference substitute in these terms:

"The House concurs in the Senate provision with an amendment to clarify that the Administrator may specify a hazardous design standard if the emission of hazardous pollutants through a conveyance designed to emit or capture such pollutants would be inconsistent with any Federal, State or local law and minor clarifying modifications in the language." *Id.*, at 131–132.

There is only one relevant lesson that may be learned from this history: As soon as someone challenged the Administrator's power to promulgate work-practice rules of this sort, Congress made it unambiguously clear that the Administrator had that power. As the Court notes, Congress preferred numerical standards; it accepted work-practice rules only as a last resort. But the same may be said of the Administrator, who instituted a wetting requirement only after becoming convinced that no other standard was practicable.

It is true, as the Court says, that the Senate Report "refrained from endorsing the Administrator's view that the regulation had previously been authorized as an emission standard under § 112 (c)." *Ante*, at 289. It is equally true that the Senate Report refrained from criticizing the Administrator's view. In short, what Congress *said* in 1977 sheds no light on its understanding of the original meaning of the 1970 Amendments. But what Congress *did* when it expressly authorized work-practice rules persuasively indicates that, if Congress in 1970 had focused on the latent ambiguity in the term "emission standard," it would have expressly granted the authority that the Administrator regarded as implicit in the statute as written.[24]

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[24] This conclusion is buttressed by the recent amendment to the judicial review provision of the Clean Air Act. *Ante*, at 286 n. 4. At oral argument in the present case, Members of this Court pointed out that § 307 (b) applied by its terms only to "emission standards" and suggested that the words "emission standard" should be given a narrow reading. See, *e. g.*, Tr. of Oral Arg. 20. That was on October 11. On November 1, a technical-amendments bill was introduced in both Houses to clarify "ambiguous language" and "technical problems" in the Clean Air Act. See 123 Cong. Rec. S18372 (Nov. 1, 1977) (statement of Sen. Muskie); see also *id.*, at H11953 (reading of H. Res. 885). The bill, which passed both Houses and was signed into law on November 16, treated the Court's present reading of "emission standard" as a simple error. To prevent future misreadings of the provision, Congress amended it to apply to "any emission standard *or requirement*" under § 112. See § 307 (b) (1), 42 U. S. C. § 7607 (b) (1) (1976 ed., Supp. I), as amended and recodified

IV

A reading of the entire statute, as amended in 1977, confirms my opinion that the asbestos regulation is, and since its promulgation has been, an emission standard. If this is not true, as the Court holds today, it is unenforceable, and will continue to be unenforceable even if promulgated anew pursuant to the authority expressly set forth in the 1977 Amendments.

The Clean Air Act treats the Administrator's power to promulgate emission standards separately from his power to enforce them. While it is § 112 (b) that gives the Administrator authority to promulgate an "emission standard," it is § 112 (c) that prohibits the violation of an "emission standard." Presumably the Court's holding that a work-practice rule is not an "emission standard" applies to both of these sections. Under that holding a work-practice rule may neither be enforced nor promulgated as an emission standard. This holding will not affect the Administrator's power to promulgate work-practice rules, because the 1977 Amendments explicitly recognize that power. But Congress has not amended § 112 (c), which continues to permit enforcement only of "emission standards." Accordingly, the Court's holding today has effectively made the asbestos regulation, and any other work-practice rule as well, unenforceable.

Ironically, therefore, the 1977 Amendments, which were intended to lift the cloud over the Administrator's authority, have actually made his exercise of that authority ineffectual. This is the kind of consequence a court risks when it substitutes its reading of a complex statute for that of the Administrator charged with the responsibility of enforcing it. More-

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by the Safe Drinking Water Amendments of 1977, § 14 (a)(79), 91 Stat. 1399 (emphasis added). The presence of a similar ambiguity in the enforcement provision was not pointed out at oral argument, and it was not corrected. This history indicates that Congress is patiently correcting judicial errors in construing "emission standard" narrowly.

over, it is a consequence which would be entirely avoided by recognizing that the Administrator acted well within his statutory authority when he promulgated the asbestos regulation as an "emission standard" for hazardous air pollutants.

I would affirm the judgment of the Court of Appeals for the Sixth Circuit.

PFIZER INC. ET AL. *v.* GOVERNMENT OF INDIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-749. Argued November 1, 1977—Decided January 11, 1978

A foreign nation otherwise entitled to sue in the courts of this country *held* to be a "person" within the meaning of §4 of the Clayton Act and thus to be entitled to sue for treble damages under the federal antitrust laws to the same extent as any other plaintiff. Pp. 311–320.

(a) Though no statutory provision or legislative history clearly covers the question whether a foreign nation is a "person" as the word is used in § 4 (which gives "any person" injured by antitrust violations the right to sue in district courts), Congress intended the word to have a broad and inclusive meaning, and in light of the antitrust laws' expansive remedial purpose, the Court has not narrowly construed the term. Pp. 311–313.

(b) Congress did not intend to make the treble-damages remedy available only to consumers in this country as is manifest from the inclusion of foreign corporations within the statutory definition of "person" and the fact that the antitrust laws extend to trade "with foreign countries." Pp. 313–314.

(c) To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat the two purposes of § 4: to deter violators and deprive them of the "'fruits of their illegality,'" and "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746. Pp. 314–315.

(d) When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State, which in *Georgia* v. *Evans*, 316 U. S. 159, was held to be a "person" within the meaning of the antitrust laws; and there is no reason why Congress would have wanted to deprive a foreign nation of the treble-damages remedy available to others who suffer through violations of the antitrust laws. Pp. 315–318.

(e) Foreign nations are generally entitled to prosecute civil claims in the courts of the United States upon the same basis as domestic corporations or individuals. To afford foreign nations the protection of the antitrust laws does not involve a judicial encroachment upon foreign policy, since only governments recognized by and at peace with the United States are entitled to access to this country's courts, and it is

within the exclusive power of the Executive Branch to determine which nations are entitled to sue. Pp. 318–320.

550 F. 2d 396, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 320. POWELL, J., filed a dissenting opinion, *post*, p. 329. BLACKMUN, J., took no part in the consideration or decision of the case.

Samuel W. Murphy, Jr., argued the cause for petitioners. With him on the briefs were *Kenneth N. Hart, William J. T. Brown, Peter Dorsey, Allen F. Maulsby, Gordon G. Busdicker, Julian O. von Kalinowski, Joe A. Walters, John H. Morrison, John P. Lynch, Merrell E. Clark, Jr.*, and *Roberts B. Owen*.

Douglas V. Rigler argued the cause for respondents. With him on the brief were *Julius Kaplan, James W. Schroeder, Harold C. Petrowitz, Ralph E. Becker, Joseph B. Friedman*, and *James H. Mann*.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are asked to decide whether a foreign nation is entitled to sue in our courts for treble damages under the antitrust laws. The respondents are the Government of India, the Imperial Government of Iran, and the Republic of the Philippines. They brought separate actions in Federal District Courts against the petitioners, six pharmaceutical manufacturing companies. The actions were later consolidated for pretrial purposes in the United States District Court for the District of Minnesota.[1] The complaints alleged that the peti-

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Acting Assistant Attorney General Shenefield, Barry Grossman*, and *Frederic Freilicher* for the United States; and by *Paul C. Sprenger* and *Eric L. Olson* for the Federal Republic of Germany.

[1] Similar actions were also brought by Spain, South Korea, West Germany, Colombia, Kuwait, and the Republic of Vietnam. Vietnam was a party to this case in the Court of Appeals and was named as a respondent

tioners had conspired to restrain and monopolize interstate and foreign trade in the manufacture, distribution, and sale of broad spectrum antibiotics, in violation of §§ 1 and 2 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. Among the practices the petitioners allegedly engaged in were price fixing, market division, and fraud upon the United States Patent Office.[2] India and Iran each alleged that it was a "sovereign foreign state with whom the United States of America maintains diplomatic relations"; the Philippines alleged that it was a "sovereign and independent government." Each respondent claimed that as a purchaser of antibiotics it had been damaged in its business or property by the alleged antitrust violations and sought treble damages under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, on its own behalf and on behalf of several classes of foreign purchasers of antibiotics.[3]

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in the petition for certiorari. Subsequent to the filing of the petition Vietnam's complaint was dismissed by the District Court on the ground that the United States no longer recognized the Government of Vietnam; the dismissal was affirmed by the Court of Appeals. *Republic of Vietnam* v. *Pfizer Inc.*, 556 F. 2d 892 (CA8). Vietnam has not participated as a party in this Court. Some of the other suits have been withdrawn and the rest are pending.

[2] The antibiotic antitrust litigation originated with a proceeding brought by the Federal Trade Commission which resulted in an order requiring petitioners Pfizer and American Cyanamid to grant domestic applicants licenses under their patents for broad spectrum antibiotics. See *Charles Pfizer & Co.* v. *FTC*, 401 F. 2d 574 (CA6). Criminal antitrust proceedings against petitioners Pfizer, American Cyanamid, and Bristol-Myers were eventually dismissed. *United States* v. *Chas. Pfizer & Co.*, 367 F. Supp. 91 (SDNY); see also *United States* v. *Chas. Pfizer & Co.*, 426 F. 2d 32 (CA2), modified, 437 F. 2d 957, aff'd by an equally divided Court, 404 U. S. 548. Most of the large number of civil suits have been settled. See *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (SDNY), aff'd, 440 F. 2d 1079 (CA2).

[3] Respondents India and Iran also sued in a *parens patriae* capacity; those claims were dismissed in a separate appeal and are not at issue here. *Pfizer Inc.* v. *Lord*, 522 F. 2d 612, 615–620 (CA8).

The petitioners asserted as an affirmative defense to the complaints that the respondents as foreign nations were not "persons" entitled to sue for treble damages under § 4. In response to pretrial motions [4] the District Court held that the respondents were "persons" and refused to dismiss the actions.[5] The trial court certified the question for appeal pursuant to 28 U. S. C. § 1292 (b).[6] The Court of Appeals for the Eighth Circuit affirmed, 550 F. 2d 396, and adhered to its decision upon rehearing en banc.[7] *Id.*, at 400. We granted certiorari to resolve an important and novel question in the administration of the antitrust laws. 430 U. S. 964.

I

As the Court of Appeals observed, this case "turns on the interpretation of the statute." 550 F. 2d, at 397. A treble-damages remedy for persons injured by antitrust violations was first provided in § 7 of the Sherman Act, and was re-enacted in 1914 without substantial change as § 4 of the Clayton Act.[8] Section 4 provides:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust

[4] Petitioners moved to dismiss the suits brought by India and Iran. The Philippines moved to strike petitioners' affirmative defense.

[5] The District Court relied upon an earlier decision denying a motion to dismiss a related suit brought by the State of Kuwait, see n. 1, *supra*. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (SDNY). An appeal was taken from that decision but was dismissed by stipulation of the parties. Thus, the Court of Appeals' decision in the present case marked the first appellate consideration of the issue.

[6] A petition for mandamus had previously been denied. *Pfizer Inc.* v. *Lord*, *supra*.

[7] Two judges dissented, believing that Congress, in passing the Sherman and Clayton Acts, did not intend to include foreign sovereigns within the scope of the term "person." 550 F. 2d, at 400. Three judges in the majority also joined a concurring opinion noting the absence of controlling legislative history and urging congressional action. *Id.*, at 399–400.

[8] Section 7 of the Sherman Act was repealed in 1955 as redundant. § 3, 69 Stat. 283; see S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955).

> laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Thus, whether a foreign nation is entitled to sue for treble damages depends upon whether it is a "person" as that word is used in § 4. There is no statutory provision or legislative history that provides a clear answer; it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted.[9]

The Court has previously noted the broad scope of the remedies provided by the antitrust laws. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236; cf. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 138–139. And the legislative history of the Sherman Act demonstrates that Congress used the phrase "any person" intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition. Indeed, during the course of those debates the word "person" was used interchangeably with other terms even

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[9] The Sherman and Clayton Acts each provide that the word "person" "shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U. S. C. §§ 7, 12.

It is apparent that this definition is inclusive rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds. Cf. *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 125 n. 1; *United States* v. *New York Telephone Co.*, *ante*, at 169 n. 15.

broader in connotation. For example, Senator Sherman said that the treble-damages remedy was being given to "any party," and Senator Edmunds, one of the principal draftsmen of the final bill,[10] said that it established "the right of anybody to sue who chooses to sue." 21 Cong. Rec. 2569, 3148 (1890).

In light of the law's expansive remedial purpose, the Court has not taken a technical or semantic approach in determining who is a "person" entitled to sue for treble damages. Instead, it has said that "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate" the proper scope of the law. *United States* v. *Cooper Corp.*, 312 U. S. 600, 605.

II

The respondents in this case possess two attributes that could arguably exclude them from the scope of the sweeping phrase "any person." They are foreign, and they are sovereign nations.

A

As to the first of these attributes, the petitioners argue that, in light of statements made during the debates on the Sherman Act and the general protectionist and chauvinistic attitude evidenced by the same Congress in debating contemporaneous tariff bills, it should be inferred that the Act was intended to protect only American consumers. Yet it is clear that a foreign *corporation* is entitled to sue for treble damages, since the definition of "person" contained in the Sherman and Clayton Acts explicitly includes "corporations and associations existing under or authorized by . . . the laws of any foreign country." See n. 9, *supra*. Moreover, the antitrust laws extend to trade "with foreign nations" as well as among the several States of the Union. 15 U. S. C. §§ 1, 2.[11] Clearly, therefore, Congress

[10] See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489 n. 10.

[11] THE CHIEF JUSTICE's dissent seems to contend that the Sherman

did not intend to make the treble-damages remedy available only to consumers in our own country.[12]

In addition, the petitioners' argument confuses the ultimate purposes of the antitrust laws with the question of who can invoke their remedies. The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

The Court has noted that § 4 has two purposes: to deter violators and deprive them of " 'the fruits of their illegality,' " and "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486; *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra*, at 139. To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny

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Act's reference to commerce with foreign nations was intended only to reach conspiracies affecting goods imported into this country. *Post*, at 323–324. But the scope of congressional power over foreign commerce has never been so limited, and it is established that the antitrust laws apply to exports as well. See, *e. g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 599; *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (Mass.).

[12] Moreover, in the Webb-Pomerene Act, ch. 50, 40 Stat. 516, as amended, 15 U. S. C. § 61 *et seq.*, Congress has provided a narrow and carefully limited exception for export activity that would otherwise violate the antitrust laws. See *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199. A judicial rule excluding all non-Americans as plaintiffs in treble-damages cases would hardly be consistent with the precisely limited exception Congress has established to the general applicability of the antitrust laws to foreign commerce.

compensation to certain of his victims, merely because he happens to deal with foreign customers.

Moreover, an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages. The conspiracy alleged by the respondents in this case operated domestically as well as internationally.[13] If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[14]

B

The second distinguishing characteristic of these respondents is that they are sovereign nations. The petitioners contend that the word "person" was clearly understood by Congress when it passed the Sherman Act to exclude sovereign governments. The word "person," however, is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed.[15] Cf. *Towne* v. *Eisner*, 245 U. S.

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[13] See n. 2, *supra*.

[14] It has been suggested that depriving foreign plaintiffs of a treble-damages remedy and thus encouraging illegal conspiracies would affect American consumers in other ways as well: by raising worldwide prices and thus contributing to American inflation; by discouraging foreign entrants who might undercut monopoly prices in this country; and by allowing violators to accumulate a "war chest" of monopoly profits to police domestic cartels and defend them from legal attacks. Velvel, Antitrust Suits by Foreign Nations, 25 Cath. U. L. Rev. 1, 7–8 (1975).

[15] The case relied on by petitioners as establishing a general rule, *United States* v. *Fox*, 94 U. S. 315, merely adopted New York's construction of its Statute of Wills, as a matter of state law. *Id.*, at 320. Even in New York

418, 425. Indeed, this Court has expressly noted that use of the word "person" in the Sherman and Clayton Acts did not create a "hard and fast rule of exclusion" of governmental bodies. *United States* v. *Cooper Corp.*, 312 U. S., at 604–605.

On the two previous occasions that the Court has considered whether a sovereign government is a "person" under the antitrust laws, the mechanical rule urged by the petitioners has been rejected.[16] In *United States* v. *Cooper Corp.*, the United States sought to maintain a treble-damages action under § 7 of the Sherman Act for injury to its business or property. The Court considered the question whether the United States was a "person" entitled to sue for treble damages as one to be decided not "by a strict construction of the words of the Act, nor by the application of artificial canons of construction," but by analyzing the language of the statute "in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction." *Id.*, at 605. The Court noted that the Sherman Act provides several

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the word "person" did not have a settled meaning. Compare *In re Will of Fox*, 52 N. Y. 530, aff'd *sub nom. United States* v. *Fox*, *supra*, with *Republic of Honduras* v. *Soto*, 112 N. Y. 310, 19 N. E. 845. In fact, contemporaneous cases generally held that the sovereign was entitled to have the benefit of a statute extending a right to "persons." See, *e. g.*, *Stanley* v. *Schwalby*, 147 U. S. 508, 514–517; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *Cotton* v. *United States*, 11 How. 229, 231.

Cases construing federal statutes of the same era also indicate that the use of the term "person" did not invariably imply an intent to exclude governmental bodies. See, *e. g.*, *Ohio* v. *Helvering*, 292 U. S. 360 ("person" in §§ 3140 and 3244 of the Revised Statutes of 1878 includes a State); *California* v. *United States*, 320 U. S. 577, 585–586 ("person" in the Shipping Act, 1916, 46 U. S. C. § 801 *et seq.*, includes both a State and a city); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 396 ("person" in the Sherman Act includes a city).

[16] Even earlier, in *Chattanooga Foundry*, *supra*, at 396, the Court held without extended discussion that a city was entitled to sue for treble damages.

separate and distinct remedies: criminal prosecutions, injunctions, and seizure of property by the United States on the one hand, and suits for treble damages "granted to redress private injury" on the other. *Id.*, at 607–608. Statements made during the congressional debates on the Sherman and Clayton Acts provided further evidence that Congress affirmatively intended to exclude the United States from the treble-damages remedy. *Id.*, at 611–612. Thus, the Court found that the United States was not a "person" entitled to bring suit for treble damages.[17]

In *Georgia* v. *Evans*, 316 U. S. 159, decided the very next Term, the question was whether Georgia was entitled to sue for treble damages under § 7 of the Sherman Act. The Court of Appeals, believing that the *Cooper* case controlled, had held that a State, like the Federal Government, was not a "person." This Court reversed, noting that *Cooper* did not hold "that the word 'person,' abstractly considered, could not include a governmental body." 316 U. S., at 161. As in *Cooper*, the Court did not rest its decision upon a bare analysis of the word "person," but relied instead upon the entire statutory context to hold that Georgia was entitled to sue. Unlike the United States, which "had chosen for itself three potent weapons for enforcing the Act," 316 U. S., at 161, a State had been given no other remedies to enforce the prohibitions of the law. To deprive it also of a suit for damages "would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State." *Id.*, at 162–163. Although the legislative history of the Sherman Act did not indicate that Congress ever considered whether a State would be entitled to sue, the Court found no reason to believe that Congress had intended to deprive a State of the remedy made available to all other victims of antitrust violations.

[17] In 1955 Congress amended the Clayton Act to allow the United States to sue for single damages when it is injured in its business or property. Ch. 283, § 1, 69 Stat. 282, 15 U. S. C. § 15a.

It is clear that in *Georgia* v. *Evans* the Court rejected the proposition that the word "person" as used in the antitrust laws excludes all sovereign states. And the reasoning of that case leads to the conclusion that a foreign nation, like a domestic State, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations. When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State. The antitrust laws provide no alternative remedies for foreign nations as they do for the United States.[18] The words of *Georgia* v. *Evans* are thus equally applicable here:

> "We can perceive no reason for believing that Congress wanted to deprive a [foreign nation], as purchaser of commodities shipped in [international] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. . . . Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 . . . . Such a construction would deny all redress to a [foreign nation], when mulcted by a violator of the Sherman Law, merely because it is a [foreign nation]." 316 U. S., at 162–163.

III

The result we reach does not involve any novel concept of the jurisdiction of the federal courts. This Court has long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States

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[18] While THE CHIEF JUSTICE's dissent says there are "weapons in the arsenals of foreign nations" sufficient to enable them to counter anticompetitive conduct, such as cartels or boycotts, *post*, at 327–328, such a political remedy is hardly available to a foreign nation faced with monopolistic control of the supply of medicines needed for the health and safety of its people.

upon the same basis as a domestic corporation or individual might do. "To deny him this privilege would manifest a want of comity and friendly feeling." *The Sapphire*, 11 Wall. 164, 167; *Monaco* v. *Mississippi*, 292 U. S. 313, 323 n. 2; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 408–409; see U. S. Const., Art. III, § 2, cl. 1.[19] To allow a foreign sovereign to sue in our courts for treble damages to the same extent as any other person injured by an antitrust violation is thus no more than a specific application of a long-settled general rule. To exclude foreign nations from the protections of our antitrust laws would, on the other hand, create a conspicuous exception to this rule, an exception that could not be justified in the absence of clear legislative intent.

Finally, the result we reach does not require the Judiciary in any way to interfere in sensitive matters of foreign policy.[20] It has long been established that only governments recognized by the United States and at peace with us are entitled to access

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[19] Congress has explicitly conferred jurisdiction upon the federal courts to entertain such suits:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

. . . . . .

"(4) a foreign state . . . as plaintiff and citizens of a State or of different States." 28 U. S. C. § 1332 (a)(4) (1976 ed.).

Among the actions foreign sovereign governments were entitled to maintain at the time of the passage of the Sherman and Clayton Acts were suits for common-law business torts, such as unfair competition, similar in general nature to antitrust claims. See *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427 (1903); *La Republique Francaise* v. *Schultz*, 94 F. 500 (SDNY 1899).

[20] In a letter that was presented to the Court of Appeals when it reconsidered this case en banc, the Legal Adviser of the Department of State advised "that the Department of State would not anticipate any foreign policy problems if . . . foreign governments [were held to be] 'persons' within the meaning of Clayton Act § 4." A copy of this letter is contained in the Memorandum for the United States as *Amicus Curiae* in opposition to the petition for a writ of certiorari filed in this Court.

to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue. *Jones* v. *United States*, 137 U. S. 202, 212; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137–138; *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, at 408–412. Nothing we decide today qualifies this established rule of complete judicial deference to the Executive Branch.[21]

We hold today only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Neither the fact that the respondents are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to "any person" victimized by violations of the antitrust laws.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that foreign nations are entitled to bring treble-damages actions in American courts against American suppliers for alleged violations of the antitrust laws; the Court reaches this extraordinary result by holding that for purposes of § 4 of the Clayton Act, foreign sovereigns are "persons," while conceding paradoxically that the question "was never considered at the time the Sherman and Clayton Acts were enacted." *Ante*, at 312.

I dissent from this undisguised exercise of legislative power, since I find the result plainly at odds not only with the language of the statute but also with its legislative history and precedents of this Court. The resolution of the delicate and

[21] Cf. n. 1, *supra*.

important policy issue of giving more than 150 foreign countries the benefits and remedies enacted to protect American consumers should be left to the Congress and the Executive. Congressional silence over a period of almost a century provides no license for the Court to make this sensitive political decision vastly expanding the scope of the statute Congress enacted.

A

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). The relevant provisions here are § 1 of the Clayton Act in which the word "person" is defined, and § 4 in which the treble-damages remedy is conferred on those falling within the precisely enumerated categories. Section 1 provides, in relevant part:

> "The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 4 then incorporates this definition by providing:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Even on the most expansive reading, these two sections provide not the slightest indication that Congress intended to allow foreign nations to sue Americans for treble damages under our antitrust laws. The very fact that foreign sover-

eigns were not included within the definition of "person" despite the explicit reference to corporations and associations existing under the "laws of any foreign country" in the same definition ought to be dispositive under established doctrine governing interpretation of statutes. I therefore see no escape from the conclusion that the omission by Congress of foreign nations was deliberate.

The inclusion of foreign *corporations* within the statutory definition in no sense argues for a different characterization of Congress' intent. At the time of the passage of both the Sherman and Clayton Acts, foreign sovereigns, even when acting in their commercial capacities, were immune from suits in the courts of this country under the doctrine of sovereign immunity. See *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812); *Ex parte Peru*, 318 U. S. 578 (1943); *Mexico* v. *Hoffman*, 324 U. S. 30 (1945). Foreign corporations, of course, had no such immunity. See, *e. g.*, *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453 (1892); *In re Hohorst*, 150 U. S. 653, 662–663 (1893). Given that "person" as used in the Clayton and Sherman Acts refers to both antitrust plaintiffs and defendants, see *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 (1941), the decision of Congress to include foreign corporations while omitting foreign *sovereigns* from the definition most likely reflects this differential susceptibility to suit rather than any intent to benefit foreign consumers or to enlist their help in enforcing our antitrust laws. It would be little short of preposterous to think that Congress in 1890 was concerned about giving such rights to foreign nations, even though it might well decide to do so now.

Respondents' claim that this disparate treatment cannot be justified today when foreign states effectively control many large foreign corporations and when sovereign immunity has been limited by the Foreign Sovereign Immunities Act of 1976, Pub. L. 94–583, 90 Stat. 2891, is not an argument appropriately addressed to or considered by this Court. If

revisions in the statute are required to take into account contemporary circumstances, that task is properly one for Congress particularly in light of the sensitive political nature and foreign policy implications of the question.

The Court's reliance on the references to "foreign nations" in §§ 1 and 2 of the Sherman Act and § 1 of the Clayton Act to support an argument that Congress was specifically concerned with foreign commerce and foreign nations in 1890 when the disputed definition was enacted is similarly unavailing. As a threshold matter, congressional concern with the foreign commerce of the United States does not entail either a desire to protect foreign nations or a willingness to allow them to sue Americans for treble damages in our courts. The Webb-Pomerene Act, ch. 50, 40 Stat. 516, as amended, 15 U. S. C. § 61 *et seq.*, passed within only a few years of the Clayton Act, indicates that such a concern may instead be served at the *expense* of foreign states and consumers.[1]

In any event, the relevant language of §§ 1 and 2 of the Sherman Act, as subsequently incorporated in the Clayton Act, does not support respondents' contention. The reference to "commerce . . . with foreign nations" appeared only in the final draft of the Act as reported by the Senate Judiciary Committee, and replaced language in the numerous earlier drafts of Senator Sherman to the following effect:

> "That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made

[1] The Webb-Pomerene Act exempts certain actions of export associations from the antitrust laws, but the exemption applies only if the association's actions do not restrain trade or affect the price of exported products within the United States and do not restrain the export trade of any domestic competitor of the association. 15 U. S. C. § 62. Although the Act was subsequently regarded as carving out an exemption from the antitrust laws, the legislative history indicates considerable question at the time whether the conduct of exporters meeting the conditions specified in the Act would have violated the antitrust laws even without the putative exemption. See H. R. Rep. No. 50, 65th Cong., 1st Sess., 2 (1917).

> with a view or which tend to prevent full and free competition in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles *imported* into the United States, . . . are hereby declared to be against public policy, unlawful and void . . . ." 21 Cong. Rec. 2598 (1890) (first draft) (emphasis added).[2]

The focus of this language on protecting *domestic* consumers from anticompetitive practices affecting the *importation* of goods into the United States could not be more clear, nor could the absence of any attention to affording comparable protection for foreign consumers of American exports. The language substituted by the Judiciary Committee—language tracking that appearing in the Commerce Clause—was chosen to mollify the objections of those Senators who felt the proposed statute exceeded Congress' constitutional power to regulate commerce, see, *e. g., id.,* at 2600, 3147 (remarks of Sen. George); *id.,* at 2728 (remarks of Sen. Edmunds); *id.,* at 3149 (remarks of Sen. Reagan); cf. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 495 (1940); *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U. S. 427, 434–435 (1932); that language was not intended to work any substantive change in the focus or scope of the Act. See *United States* v. *Wise,* 370 U. S. 405, 420 (1962) (Harlan, J., concurring). To read this language as evidencing an intent to protect foreign nations or foreign consumers simply belies its lineage.

B

The legislative history of the treble-damages remedy gives no more support to the result reached by the Court than does the language of the statute. As five of the eight judges of the Court of Appeals concluded—and indeed as the majority here concedes, *ante,* at 312—"Congress, in passing § 4 of the Clayton Act, 15 U. S. C. § 15, gave no consideration *nor did*

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[2] The equivalent language of subsequent drafts can be found at 21 Cong. Rec. 2598–2600 (1890).

it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act." 550 F. 2d 396, 399 (Ross, J., concurring) (emphasis added). The conversion of this silence in 1890 into an affirmative intent in 1978 is indeed startling.

The failure of Congress even to consider the question of granting treble-damages remedies to foreign nations provides the clearest possible argument for leaving the question to the same political process that gave birth to the Sherman and Clayton Acts. To rely on the absence of any *express* congressional intent to exclude foreign nations from taking advantage of the treble-damages remedy is a remarkable innovation in statutory interpretation. It is a strange way to camouflage the unassailable conclusion that the legislative history offers no affirmative support for the result reached today. Further, as this Court observed just last Term, the legislative history of the treble-damages remedy which does exist "indicate[s] that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 486 n. 10 (1977), quoting from 21 Cong. Rec. 1767–1768 (1890) (remarks of Sen. George). What we so recently saw as primarily a remedy for American consumers is now extended to all the nations of the world—a boon Congress might choose to grant but has not done so.

C

In the absence of any helpful language in the statute or any affirmative legislative history, the Court attempts to base its expansive reading of "person" on Mr. Justice Frankfurter's decision in *Georgia* v. *Evans*, 316 U. S. 159 (1942), granting the State of Georgia and all other *domestic* States the right to sue for treble damages. I fail to see how that result dictates this one.

In *Georgia* v. *Evans*, Mr. Justice Frankfurter concluded that absent the right to sue for treble damages, our States would

be left without any remedy against violators of the antitrust laws. The Court today analogizes the situation of foreign nations to that of the States in *Evans,* and finds the analogy dispositive. When viewed solely in terms of the remedies specifically provided by the antitrust laws, the plight of domestic States and foreign sovereigns may, in this limited respect, be roughly comparable. But the very limited scope of the inquiry in *Evans* precludes consideration of the manifold and patently obvious respects in which foreign nations and our own domestic States differ—cogent differences bearing on the question under consideration here, though obviously not at all on the Court's inquiry in *Evans.*

First, the disparate treatment of foreign and domestic States is a legitimate source of concern only on the assumption that Congress in passing the Sherman Act intended—or even contemplated—that these two categories of political entities were so essentially alike that they were entitled to the same remedies against anticompetitive conduct. As I have already suggested, this assumption derives no support from either the statutory language or anything in the legislative history. Although our own States were also not the expressly intended beneficiaries of the Act, to deny them the treble-damages remedy would, as Mr. Justice Frankfurter perceived, have the unmistakable result of effectively denying surrogate protection to American citizens in whose behalf the State acts and for whose benefit the Sherman Act was enacted. Thus, while the result in *Evans* is a tolerable taking of certain liberties with the literal language of the statute, the congruence of that result with Congress' purpose can scarcely be doubted. This same logic, however, does not even remotely apply to the situation of foreign nations.

Second, it simply is not the case that absent a treble-damages remedy, foreign nations would be denied any effective means of redress against anticompetitive practices by American corporations. Unlike our own States, whose freedom of action in this regard is constrained by the Commerce and Supremacy

Clauses, foreign sovereigns remain free to enact and enforce their own comprehensive antitrust statutes and to impose other more drastic sanctions on offending corporations. One need look no further than the laws of respondents India and the Philippines for evidence that such remedies are possessed by foreign nations. And indeed, *amicus* West Germany has demonstrated that such laws are not mere idle enactments. During the pendency of this action, it notified petitioner Pfizer that a proceeding under German antitrust law was being commenced involving some of the same allegations which are made in the complaint filed by respondents in their treble-damages actions in this country.

While problems of jurisdiction and discovery may render antitrust actions against foreign defendants somewhat more problematic than a suit against a corporation in its own country, the limited experience of the Common Market nations in applying their antitrust laws to foreign corporations suggests that such difficulties are certainly not insoluble and are likely exaggerated. See, *e. g., Europemballage Corp.* v. *E. C. Commission,* 12 Comm. Mkt. L. R. 199 (1973); *Commercial Solvents Corp.* v. *E. C. Commission,* 13 Comm. Mkt. L. R. 309 (1974). And, as the presently existing treaty between the United States and West Germany indicates, *reciprocal* agreements providing for cooperation in antitrust investigations undertaken by foreign nations are an effective means of mitigating the rigors of discovery in foreign jurisdictions. See Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, entered into force Sept. 11, 1976. United States—Federal Republic of Germany, [1976] 27 U. S. T. 1956, T. I. A. S. No. 8291.

Third, it takes little imagination to realize the dramatic and very real differences in terms of coercive economic power and political interests which distinguish our own States from foreign sovereigns. The international price fixing, boycotts, and other current anticompetitive practices undertaken by some Middle Eastern nations are illustrative of the weapons

in the arsenals of foreign nations which no domestic State could ever employ. Nor do our domestic States, in any meaningful sense, have the conflicting economic interests or antagonistic ideologies which characterize and enliven the relations among nation states.

Viewed in this light, it is clear that the decision to allow foreign sovereigns to seek treble damages from Americans and to rely on standards of competitive behavior in fixing liability which those very same nations flout in their business relationships with this country is a decision dramatically different from the one Mr. Justice Frankfurter faced in *Evans*. To consider the result reached there as to Georgia determinative of the result here is to substitute a "hard and fast rule of inclusion" for the "hard and fast rule of exclusion" which Justices Frankfurter and Roberts eschewed in *Evans* and *Cooper*, respectively. Only the most mechanical reading of our prior precedent will justify such a result.

Further, the result reached by the Court today confronts us with the anomaly that while the United States Government cannot sue for treble damages under our antitrust laws, other nations are free to engage in the most flagrant kinds of combinations for price fixing, totally at odds with our antitrust concepts, and nevertheless are given the right by the Court to sue American suppliers in American courts for treble damages plus attorneys' fees. It is no answer to say that the United States needs no civil treble-damages remedy since it has reserved for itself the power to pursue criminal remedies against American suppliers for antitrust violations. What that response overlooks is that our criminal antitrust remedies hardly compare with the infinite array of political and commercial weapons available to a foreign nation for use against the United States itself or against American producers and suppliers. This, again, underscores how completely the problem is a matter of policy to be resolved by the political branches without the intrusion of the Judiciary.

D

Finally, the Court's emphasis on the deterrent effects of treble-damages actions by foreign sovereigns also will not withstand critical scrutiny. We acknowledged in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S., at 485–486, that while treble damages do play an important role in deterring wrongdoers, "the treble-damages provision . . . is designed primarily as a remedy." To allow foreign sovereigns who were clearly not the intended beneficiaries of this remedy to nevertheless invoke it reverses this priority of purposes, and does so solely on the basis of this Court's uninformed speculation about some possible beneficial consequences to American consumers of this "maximum deterrent." *Ante*, at 315. In areas of far less political delicacy, we have been unwilling to expand the scope of the right to sue under the antitrust laws without express congressional intent to do so. See, *e. g.*, *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 264–265 (1972).[3]

For these reasons I dissent from the Court's intrusion into the legislative sphere.

MR. JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE in his dissent, and add a word to emphasize my difficulty with the Court's decision.

The issue is whether the antitrust laws of this country are to be made available for treble-damages suits against American businesses by the governments of other countries. The Court resolves this issue in favor of such governments by construing the word "person" in § 4 of the Clayton Act to include

[3] The Court adverts to a letter from the Legal Adviser of the State Department to the Court of Appeals advising that no foreign policy problems were anticipated from a decision holding foreign governments to be persons within the meaning of § 4 of the Clayton Act. The significance of this communication escapes me. Nothing in the Constitution suggests legislative power may be exercised jointly by the courts and the Department of State.

"foreign governments." No one argues seriously that this was the intent of Congress in 1890 when the term "person" was included in the Act. Indeed, the Court acknowledges that this "question was never considered at the time the Sherman and Clayton Acts were enacted." *Ante,* at 312.

Despite this conclusion as to the absence of any congressional consideration, the inviting possibility of treble damages is extended today by judicial action to the sovereign nations of the world.[1] With minor exceptions, the United States recognizes the governments of all of these nations. We may assume that most of them have no equivalent of our antitrust laws and would be unlikely to afford reciprocal opportunities to the United States to sue and recover damages in their courts.

The Court has resolved a major policy question. As the Acting Solicitor General stated in his Memorandum for the United States as *Amicus Curiae,* filed March 23, 1977:

> "Whether foreign sovereigns are 'persons' entitled to sue under Section 4 depends largely upon the general policy reflected in the statute, and the general policy of the United States opening its courts to foreign sovereigns."

I had thought it was accepted doctrine that questions of "general policy"—especially with respect to foreign sovereigns and absent explicit legislative authority—are beyond the province of the Judicial Branch. If the statute truly reflected a general policy that dictated the inclusion of foreign sovereigns, the Court might be justified in reaching today's result. In *Georgia* v. *Evans,* 316 U. S. 159 (1942), a clear policy to protect the States of the Union was reflected in the antitrust laws and in the legislative history. The Court could "perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available

[1] At present there are 162 sovereign nations.

to other purchasers who suffer through violation of the Act." *Id.*, at 162.

Unlike the majority, I do not believe the same can be said with respect to foreign sovereigns. See *ante*, at 318. It is not only the absence of specific congressional intent to include them. It is that the predicate for the Court's approach in *Georgia* v. *Evans* is not present in the case before us. The solicitude that we assume Congress has for the welfare of each of the United States, especially when the subject matter of legislation largely has been removed from the competence of the States and has been entrusted to the United States, cannot be assumed with respect to foreign nations. Putting it differently, it was not illogical for the *Evans* Court to include the States within the reach of § 4, but it is a quantum leap to include foreign governments.

A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question in the best interest of our country. It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment.[2]

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[2] The Court quotes a letter to the effect that "the Department of State would not anticipate any *foreign policy problems*" if § 4 were held to embrace suits by foreign governments. *Ante*, at 319 n. 20 (emphasis supplied). But resolution of the issue here depends not only upon foreign policy considerations but also upon considerations relevant to the general welfare of the United States. The latter are quite beyond the concern of the Department of State and should be considered by the Legislative Branch. The international business conducted by American corporations has economic and social ramifications of great importance to our country.

SMITH *v.* DIGMON, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-6799. Decided January 16, 1978

In denying petitioner state prisoner's federal habeas corpus petition, the District Court erred in refusing to entertain petitioner's claim of constitutional error at his Alabama state trial, on the ground that the exhaustion requirement of 28 U. S. C. § 2254 (b) had not been satisfied because such claim had not been presented to any state court, where, although the Alabama Court of Criminal Appeals had not referred to the claim in its opinion affirming petitioner's conviction, the claim in fact had been submitted in petitioner's brief and answered in the State's brief in that court.

Certiorari granted; reversed and remanded.

PER CURIAM.

Petitioner sought habeas corpus relief in the United States District Court for the Northern District of Alabama from his sentence following a judgment of conviction for rape in the Circuit Court of Calhoun County, Ala. Among the allegations of constitutional error in his trial—presented to the District Court in petitioner's traverse to the State's response to his petition—petitioner claimed that the in-court identification of him by the prosecuting witness was the product of an out-of-court identification at an impermissibly suggestive photographic array and a later uncounseled lineup. The District Court refused to entertain this claim on the ground, recited in its opinion, that "this issue has never been presented to any state court." No. 77-A-0029-E (mem. filed Feb. 11, 1977). This conclusion was premised upon the absence of any reference to the contention in the reported opinion of the Alabama Court of Criminal Appeals affirming the conviction. *Smith* v. *State*, 57 Ala. App. 164, 326 So. 2d 692 (1975). The District Court stated: "It is inconceivable to this Court that had

Smith raised that issue [in the Alabama Court of Criminal Appeals] that [that court] would not have written to it." The Court of Appeals for the Fifth Circuit denied petitioner's *pro se* application for a certificate of probable cause and for leave to appeal *in forma pauperis*. No. 77–8141 (Apr. 20, 1977).

In his *pro se* petition for certiorari, petitioner asserted that "[i]t is beyond doubt that State remedies have been exhausted." Pet. for Cert. 3. This Court directed the filing here of the briefs submitted to the Alabama Court of Criminal Appeals. Petitioner's brief to that court reveals that petitioner, citing decisions of this Court,[1] did indeed submit the constitutional contention that the prosecuting witness' in-court identification should have been excluded from evidence because that identification derived from an impermissibly suggestive pretrial photographic array and a later uncounseled lineup; moreover, the State Attorney General's brief devoted two of its seven pages to argument answering the contention.[2]

It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U. S. C. § 2254 (b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court, and, indeed, in this case, vigorously opposed in the State's brief. It is equally obvious that a district court commits plain error

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[1] *Simmons* v. *United States*, 390 U. S. 377 (1968); *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); *Stovall* v. *Denno*, 388 U. S. 293 (1967).

[2] Inexplicably, the Attorney General's response to the petition for certiorari, which squarely presented the question whether habeas "was improperly denied," made no mention whatever that his brief to the Alabama Court of Criminal Appeals had joined issue on the pretrial photographic array and lineup issues, and did not point out that the District Court erred in stating in its order that "this issue has never been presented to any state court." Rather, the response argued only that petitioner had raised only two other issues in federal court neither of which was cognizable on habeas.

in assuming that a habeas petitioner must have failed to raise in the state courts a meritorious claim that he is incarcerated in violation of the Constitution if the state appellate court's opinion contains no reference to the claim.

The motion to proceed *in forma pauperis*, and the petition for certiorari are granted. The order of the Court of Appeals and the judgment of the District Court are reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the result.

I am not at all certain that the petitioner properly raised before the Court of Appeals the error upon which we today reverse and remand. While petitioner filed a *pro se* application for probable cause and for leave to appeal *in forma pauperis* with the Court of Appeals, as far as the record shows, he did not allege any particular error on the part of the District Court. Again as far as the record shows, petitioner failed to bring the District Court's error to anyone's attention until his petition for certiorari in this Court. The lower courts are better equipped and suited to resolve factual errors of the nature raised here and such errors should therefore be raised before them in the first instance. Indeed, we would seem limited to only those questions explicitly presented to the Court of Appeals.

However, because it is now clear that the District Court erred in concluding that the petitioner had not raised the in-court identification issue before the state courts, I defer to the Court's necessarily implied conclusion that the question was presented to the Court of Appeals and concur in the result.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76–719. Argued October 31, 1977—Decided January 17, 1978

An employer in the construction business made an agreement with respondent union under § 8 (f) of the National Labor Relations Act, which provides that it shall not be an unfair labor practice for unions and employers in the construction industry to enter into "prehire" agreements before the majority status of the union has been established. The contract contained no union security clause requiring employees to become union members within a specified period of time. After the employer later undertook construction projects with nonunion labor the union picketed those projects (one for more than 30 days) with signs stating that the employer was violating the agreement with the union, though the union did not represent a majority of the employees at the jobsites and had not petitioned for a representation election. The employer then filed a charge with the National Labor Relations Board alleging that the union was violating § 8 (b) (7) (C) of the Act, which makes it an unfair labor practice for an uncertified union to picket for the purpose of forcing an employer to recognize the union as a bargaining representative of his employees, for more than 30 days, unless a petition for an election has been filed within that period. The NLRB issued a cease-and-desist order in favor of the employer, concluding that an object of the picketing was to force the employer to bargain with a union that was not currently certified as the representative of the employees working for the employer. The Court of Appeals, denying enforcement of the NLRB's order, held that the validity of a § 8 (f) prehire contract conferred the right to enforce the contract by picketing as well as the right, upon a contract breach, to file and prevail on an unfair labor practice charge against the employer for failure to bargain. *Held:* Respondent's picketing was for recognitional purposes and constituted an unfair labor practice under § 8 (b) (7) (C). An uncertified union like respondent, which does not represent a majority of the employees, may not under that provision engage in picketing in an effort to enforce a prehire agreement with the employer. Pp. 341–352.

(a) Section 8 (f), which contains a proviso clause that a "prehire" contract shall not bar a petition for an election under § 9 (c), was not intended to relieve a union party to a prehire agreement from the obligation to achieve majority support before it can require the employer to honor such an agreement by means of § 8 (a) (5), or to accord the union the status of bargaining representative that would exempt it from the recognitional picketing prohibition of § 8 (b) (7). The NLRB therefore correctly held that when the union picketed to enforce its prehire agreement the employer could file and prevail on a § 8 (b) (7) charge, because the union lacked majority credentials at the picketed projects. Picketing to enforce the § 8 (f) contract was tantamount to recognitional picketing and § 8 (b) (7) (C) was infringed when the union failed to request an election within 30 days. Pp. 342–346.

(b) Because § 8 (b) (7) was adopted to ensure employees the voluntary, uncoerced selection of a bargaining representative, the NLRB did not err in holding that that provision applies to a minority union's picketing to enforce a prehire contract. Nor does the NLRB's position, which is entitled to considerable deference, render § 8 (f) meaningless, since but for that provision neither party could execute a prehire agreement without committing an unfair labor practice and the voluntary observance of an otherwise valid § 8 (f) contract is left unchallenged. *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U. S. 17; *Building & Construction Trades Council of Santa Barbara County (Sullivan Electric Co.)*, 146 N. L. R. B. 1086, distinguished. Pp. 346–352.

175 U. S. App. D. C. 259, 535 F. 2d 87, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 352.

Norton J. Come argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Richard A. Allen, John S. Irving, Carl L. Taylor,* and *Linda Sher.*

Sydney L. Berger argued the cause for respondents. With him on the brief was *Charles L. Berger.**

**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Sections 8 (b)(7) and 8 (f) were added to the National Labor Relations Act in 1959.[1] Section 8 (f), permitting so-

[1] Section 8 (b)(7), 73 Stat. 544, 29 U. S. C. § 158 (b)(7), provides:

"It shall be an unfair labor practice for a labor organization or its agents . . . to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b)."

Section 8 (f), 73 Stat. 545, 29 U. S. C. § 158 (f), provides:

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted

called "prehire" agreements in the construction industry, provides that it shall not be an unfair labor practice to enter into such an agreement with a union that has not attained majority status prior to the execution of the agreement. Under § 8 (b) (7) (C), a union that is not the certified representative of the employees in the relevant unit commits an unfair labor practice if it pickets an employer with "an object" of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees" and if it does not within 30 days file a petition for an election under § 9 (c). The National Labor Relations Board (Board) held that it is an unfair labor practice within the meaning of § 8 (b) (7) (C) for an uncertified union not representing a majority of the employees to engage in extended picketing in an effort to enforce a prehire agreement with the employer.[2] The issue here is whether this is a misapplication of the section, as the Court of Appeals held in this case.[3]

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by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreements, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e)."

[2] *Iron Workers Local 103* (*Higdon Contracting Co.*), 216 N. L. R. B. 45 (1975).

[3] *Iron Workers Local 103* v. *NLRB*, 175 U. S. App. D. C. 259, 535 F. 2d 87 (1976).

I

Higdon Construction Co. and Local 103 of the International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO (hereinafter Local 103), had a history of collective bargaining dating back to 1968. A prehire agreement was reached by Local 103 and Higdon on July 31, 1973, obliging Higdon to abide by the terms of the multiemployer understanding between Local 103 and the Tri-State Iron Workers Employers Association, Inc. No union security clause provision was contained in the Local 103-Higdon agreement. At about the same time, Higdon Contracting Co. was formed for the express purpose of carrying on construction work with nonunion labor. Local 103 picketed two projects subsequently undertaken by Higdon Contracting Co., in Kentucky and Indiana, with signs which read: "Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103." Picketing at one jobsite persisted for more than 30 days, into March 1974. Local 103 had never represented a majority of the employees at either site and, although it was free to do so, it did not petition for a representation election to determine the wishes of the employees at either location.

On March 6, 1974, Higdon Contracting Co. filed a charge with the Regional Director of the Board, alleging that Local 103 was violating § 8 (b)(7) of the Labor Act. The Administrative Law Judge found that Higdon Contracting Co. and Higdon Construction Co. were legally indistinct for purposes of the proceedings. In an opinion issued August 23, 1974, he concluded that Local 103's picketing did not constitute an unfair labor practice. Higdon had entered into a lawful § 8 (f) prehire contract with Local 103 by which it promised to abide by the multiemployer standard. The picketing was for purposes of obtaining compliance with an existing contract, rather than to obtain recognition or bargaining as an initial matter. Only the latter was a purpose forbidden by § 8 (b)(7).

The Board did not agree with the Administrative Law Judge. Relying on its *R. J. Smith* decision,[4] the Board emphasized the fact that Local 103 had never achieved majority status, and the § 8 (f) agreement thus had no binding force on the employer. For this reason, Local 103's picketing was not simply for the purpose of forcing compliance with an existing contract, even though the Board accepted the finding that only a single employer was involved. Under the Board's view of the law and the evidence, an object of the picketing was "forcing and requiring Higdon Contracting Company, Inc., to bargain with [Local 103], without being currently certified as the representative of Higdon Contracting Company, Inc.'s employees and without a petition under Section 9 (c) being filed within a reasonable period of time . . . ."

Local 103 sought review in the United States Court of Appeals for the District of Columbia Circuit. That court set aside the order, as it had set aside the Board's *R. J. Smith* order three years previously.[5] The Court of Appeals ruled that the validity of a § 8 (f) prehire contract carried with it the right to enforce that contract by picketing, and the right as well, when breach of the agreement occurs, to file and prevail on an unfair labor practice charge against the employer for failure to bargain. This elevation of a nonmajority union to the rights of majority status was acceptable, in the court's view, because of the second proviso to § 8 (f), which denies the usual contract bar protection to prehire agreements and permits a representation election to be held at the instance of either party at any time during the life of the agreement.

The Board's subsequent petition to this Court for a writ of certiorari was granted.[6] We reverse.

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[4] *R. J. Smith Construction Co.*, 191 N. L. R. B. 693 (1971), enf. denied *sub nom. Engineers Local 150* v. *NLRB*, 156 U. S. App. D. C. 294, 480 F. 2d 1186 (1973).

[5] *Engineers Local 150* v. *NLRB*, *supra*.

[6] 429 U. S. 1089 (1977).

II

It is undisputed that the union was not the certified representative of Higdon's employees and that it did not file an election petition within 30 days of the onset of the picketing. The issue for the Board was whether for the purposes of § 8 (b)(7)(C), the union pickets carrying signs asserting that Higdon was violating an agreement with the union were picketing with the forbidden purpose of requiring Higdon to recognize or bargain with the union. Under the Board's view of § 8 (f), a prehire agreement does not entitle a minority union to be treated as the majority representative of the employees until and unless it attains majority support in the relevant unit. Until that time the prehire agreement is voidable and does not have the same stature as a collective-bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer. Accordingly, the Board holds, as it did here, that picketing by a minority union to enforce a prehire agreement that the employer refuses to honor, effectively has the object of attaining recognition as the bargaining representative with majority support among the employees, and is consequently violative of § 8 (b)(7)(C). The Board and the Court of Appeals thus differ principally on the legal questions of how § 8 (f) is to be construed and of what consequences the execution of a prehire agreement has on the enforcement of other sections of the Act, primarily §§ 8 (a)(5) and 8 (b)(7)(C). We have concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections.[7]

[7] As will appear, the Board's conclusion that an object of the picketing was to obtain recognition even though Local 103 sought only to enforce the § 8 (f) contract, flows from the Board's view that a prehire contract is not the equivalent of recognizing the union as the majority representa-

Although on its face, § 8 (b)(7)(C) would apply to any extended picketing by an uncertified union where recognition or bargaining is an object, the section has not been literally

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tive of the employees, and that an attempt to enforce the prehire agreement by picketing to require the employer to treat with the union is recognitional picketing.

Determining the object, or objects, of labor union picketing is a recurring and necessary function of the Board. Its resolution of these mixed factual and legal questions normally survives judicial review. A type of activity frequently found to violate § 8 (b)(7) is picketing ostensibly for the purpose of forcing an employer to abide by terms incorporated into agreements between the union and other employers. Even in cases where the union expressly disavows any recognitional intent, acceptance of the uniform terms proposed by the union can have the "net effect" of establishing the union "as the negotiator of wage rates and benefits." *Centralia Building & Construction Trades Council* v. *NLRB*, 124 U. S. App. D. C. 212, 214, 363 F. 2d 699, 701 (1966). "The Board has held that informing the public that an employer does not employ members of a labor organization indicates an organizational object, and that stating that an employer does not have a contract with a labor organization similarly implies an object of recognition and bargaining." *Carpenters Local 906*, 204 N. L. R. B. 138, 139 (1973). Hence, picketing to enforce area standards, where an employer had been assured by notice from the union that "while we expect you to observe the wages, hours, and other benefits set forth in these documents, we do not expect or seek any collective bargaining relationship with your firm," has been held to violate § 8 (b)(7). *Hotel & Restaurant Employees (Holiday Inns of America, Inc.)*, 169 N. L. R. B. 683, 684 (1968).

The Courts of Appeals have upheld the Board in these inferences. "Though this legend ['Non-Union Conditions'] could be interpreted as merely a protest of the restaurant's working conditions, it was reasonable for the NLRB to conclude that the message . . . was at least in part that the union desired to alter a non-union working situation by obtaining recognition. In the absence of any countervailing evidence, the NLRB could thus determine that the purpose of the picketing was recognitional." *San Francisco Local Joint Board* v. *NLRB*, 163 U. S. App. D. C. 234, 239, 501 F. 2d 794, 799 (1974). See also *NLRB* v. *Carpenters*, 450 F. 2d 1255 (CA9 1971), and cases cited therein.

In the present case, the Local's business agent contacted Higdon Contracting's general manager, asking "if 'we' were going to use union people

applied. The Board holds that an employer's refusal to honor a collective-bargaining contract executed with the union having majority support is a refusal to bargain and an unfair labor practice under § 8 (a)(5).[8] Extended picketing by the union attempting to enforce the contract thus seeks to require bargaining, but as the Board applies the Act, § 8 (b)(7)(C) does not bar such picketing. *Building & Construction Trades Council of Santa Barbara County* (*Sullivan Electric Co.*), 146 N. L. R. B. 1086 (1964); *Bay Counties District Council of Carpenters* (*Disney Roofing & Material Co.*), 154 N. L. R. B. 1598, 1605 (1965). The prohibition of § 8 (b)(7)(C) against picketing with an object of forcing an employer "to recognize or bargain with a labor organization" should not be read as encompassing two separate and unrelated terms, but was "intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees." *Sullivan Electric, supra,* at 1087.

As the present case demonstrates, however, the *Sullivan Electric* rule does not protect picketing to enforce a contract

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on the job." The general manager answered in the negative; the business agent replied, "I'll get right on it," and the pickets materialized. The message on the picket signs announced that Higdon was not in compliance with the terms of its agreement with Local 103. The inference is certainly sustainable that Local 103 wished Higdon to abide by those terms.

Hence, if the Board is correct in its view of the interaction of §§ 8 (f) and 8 (b)(7)(C), the Board's decision here was within settled precedent in concluding that a purpose of the picketing was to force Higdon Contracting to recognize or bargain with the union. The picketing carried on in this case, unless § 8 (f) required a contrary conclusion as a matter of law, was in clear violation of § 8 (b)(7)(C).

[8] See *NLRB* v. *Hyde*, 339 F. 2d 568, 571–573 (CA9 1965). A contract with a majority representative also carries with it the presumption that the union's majority status still obtains. *Dayton Motels, Inc.*, 192 N. L. R. B. 674, 678 (1971), remanded, 474 F. 2d 328 (CA6 1973), enf'd, 525 F. 2d 476 (CA6 1976).

entered into pursuant to § 8 (f) where the union is not and has never been the chosen representative of a majority of the employees in a relevant unit. Neither will the Board issue a § 8 (a)(5) bargaining order against an employee refusing to abide by a § 8 (f) contract unless the complaining union can demonstrate its majority status in the unit. *R. J. Smith Construction Co.*, 191 N. L. R. B. 693 (1971).

The Board's position is rooted in the generally prevailing statutory policy that a union should not purport to act as the collective-bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit. Section 7 of the Act, 61 Stat. 140, 29 U. S. C. § 157, guarantees the employees the right to bargain collectively with representatives of their own choosing. Section 9 (a), 29 U. S. C. § 159 (a), provides that the bargaining agent for all of the employees in the appropriate unit must be the representative "designated or selected for the purposes of collective bargaining by the majority of the employees . . . ."

It is thus an unfair practice for an employer under §§ 8 (a)(1) and (2) and for a union under § 8 (b)(1)(A) to interfere with, restrain, or coerce employees in the exercise of their right to select their representative. The Court has held that both union and employer commit unfair practices when they sign a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests. "There could be no clearer abridgment of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity" than to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *Garment Workers* v. *NLRB*, 366 U. S. 731, 737 (1961). This is true even though the employer and the union believe in good faith, but mistakenly, that the union

has obtained majority support. "To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Id.*, at 738–739.

Section 8 (f) is an exception to this rule. The execution of an agreement with a minority union, an act normally an unfair practice by both employer and union, is legitimated by § 8 (f) when the employer is in the construction industry. The exception is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective-bargaining contract does not apply to prehire agreements. A proviso to the section declares that a § 8 (f) contract, which would be invalid absent the section, "shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e)." The employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time.

The proviso exposing unions with prehire agreements to inquiry into their majority standing by elections under § 9 (c) led the Board to its decision in *R. J. Smith:* An employer does not commit an unfair practice under § 8 (a)(5) when he refuses to honor the contract and bargain with the union and the union fails to establish in the unfair labor practice proceeding that it has ever had majority support. As viewed by the Board, a "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *Ruttmann Construction Co.*, 191 N. L. R. B. 701, 702 (1971). The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites. In *NLRB* v. *Irvin*, 475 F. 2d 1265 (CA3 1973), for example, the prehire contract was deemed binding on those projects at which the union had secured a majority but not with respect to those

projects not yet begun before the union had terminated the contract.

Applying this view of § 8 (f) in the § 8 (b)(7)(C) context, the Board held in this case that when the union picketed to enforce its prehire agreement, Higdon could challenge the union's majority standing by filing a § 8 (b)(7) charge and could prevail, as Higdon did here, because the union admittedly lacked majority credentials at the picketed projects. Absent these qualifications, the collective-bargaining relationship and the union's entitlement to act as the exclusive bargaining agent had never matured. Picketing to enforce the § 8 (f) contract was the legal equivalent of picketing to require recognition as the exclusive agent, and § 8 (b)(7)(C) was infringed when the union failed to request an election within 30 days.

Nothing in the language or purposes of either § 8 (f) or § 8 (b)(7) forecloses this application of the statute. Because of § 8 (f), the making of prehire agreements with minority unions is not an unfair practice as it would be in other industries. But § 8 (f) itself does not purport to authorize picketing to enforce prehire agreements where the union has not achieved majority support. Neither does it expand the duty of an employer under § 8 (a)(5), which is to bargain with a *majority* representative, to require the employer to bargain with a union with which he has executed a prehire agreement but which has failed to win majority support in the covered unit.

As for § 8 (b)(7), which, along with § 8 (f), was added in 1959, its major purpose was to implement one of the Act's principal goals—to ensure that employees were free to make an uncoerced choice of bargaining agent. As we recognized in *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975), "[o]ne of the major aims of the 1959 Act was to limit 'top down' organizing campaigns, in which unions used economic weapons to force recognition from an employer

regardless of the wishes of his employees." *Id.*, at 632, and references cited therein. The use of picketing was of particular concern as a method of coercion in three specific contexts: where employees had already selected another union representative, where employees had recently voted against a labor union, and where employees had not been given a chance to vote on the question of representation. Picketing in these circumstances was thought impermissibly to interfere with the employees' freedom of choice.[9]

Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the

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[9] "The total effect of these proposals in the administration bill would be to regulate picketing so that employers and their employees will not be subject to the continuous coercion of an organizational picket line." 105 Cong. Rec. 1731 (1959) (remarks of Sen. Dirksen), 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 994 (hereinafter cited as Leg. Hist.).

The administration bill had added the provisions that would become § 8 (b) (7). The Department of Labor's explanatory statement grouped together the ways in which unfair picketing pressure could be exerted, and noted that the bill would make it "an unfair labor practice, subject to mandatory injunction, for a union to picket in order to coerce an employer to recognize it as bargaining representative of his employees . . . ." 105 Cong. Rec. 1281 (1959), 2 Leg. Hist. 977.

The President's transmittal letter had stated:

"I recommend legislation . . . [t]o make it illegal for a union, by picketing, to coerce an employer to recognize it as the bargaining representative of his employees or his employees to accept or designate it as their representative where the employer has recognized in accordance with law another labor organization, or where a representation election has been conducted within the last preceding 12 months, or where it cannot be demonstrated that there is a sufficient showing of interest on the part of the employees in being represented by the picketing union *or where the picketing has continued for a reasonable period of time without the desires of the employees being determined by a representation election; and to provide speedy and effective enforcement measures.*" S. Doc. No. 10, 86th Cong., 1st Sess., 2–3 (1959), 1 Leg. Hist. 81–82 (emphasis added).

construction industry.[10] Section 8 (f) was, of course, motivated by an awareness of the unique situation in that industry. Because the Board had not asserted jurisdiction over the construction industry before 1947, the House Committee Report observed that concepts evoked by the Board had been "developed without reference to the construction industry." H. R. Rep. No. 741, 86th Cong., 1st Sess., 19 (1959), 1 Leg. Hist. 777. There were two aspects peculiar to the building trades that Congress apparently thought justified the use of prehire agreements with unions that did not then represent a majority of the employees:

> "One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral." *Ibid.*

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[10] Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle. Representative Barden, an important House floor leader on the bill and a conferee, introduced as an expression of legislative intent Senator Kennedy's explanation the year before of the voluntary nature of the prehire provision:

"Mr. Kennedy: I shall answer the Senator from Florida as follows—and it is my intention, by so answering, to establish the legislative history on this question: It was not the intention of the committee to require by section 604 (a) the making of prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements." 105 Cong. Rec. 18128 (1959), 2 Leg. Hist. 1715.

The House Conference Report similarly stressed that "[n]othing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such prehire agreements." H. R. Rep. No. 1147, 86th Cong., 1st Sess., 42 (1959), 1 Leg. Hist. 946.

The Senate Report also noted that "[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers." S. Rep. No. 187, 86th Cong., 1st Sess., 55 (1959), 1 Leg. Hist. 541–542. Privileging unions and employers to execute and observe prehire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes. Hence the proviso that an election could be demanded despite the prehire agreement. By the same token, because § 8 (b)(7) was adopted to ensure voluntary, uncoerced selection of a bargaining representative by employees, we cannot fault the Board for holding that § 8 (b)(7) applies to a minority union picketing to enforce a prehire contract.

The Board's position does not, as respondents claim, render § 8 (f) meaningless.[11] Except for § 8 (f), neither the employer nor the union could execute prehire agreements without committing unfair labor practices. Neither has the Board challenged the voluntary observance of otherwise valid § 8 (f) contracts, which is the normal course of events. It is also

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[11] A comparable situation obtains concerning hot-cargo clauses, which are permitted in the construction industry by § 8 (e), 29 U. S. C. § 158 (e), but which cannot be enforced by picketing. Before the enactment of the proviso, this Court held that it was a violation of the secondary boycott provisions of the Act, § 8 (b)(4)(A), 61 Stat. 136, to enforce a lawful hot-cargo clause in a contract by refusing to work. *Carpenters* v. *NLRB*, 357 U. S. 93 (1958). After the adoption of § 8 (e), it has remained the Board's position that a hot-cargo clause in the construction industry, which is exempted from the ban of § 8 (e), may not be enforced by conduct forbidden by § 8 (b)(4). *Northeastern Indiana Building & Construction Trades Council*, 148 N. L. R. B. 854 (1964), remanded on other grounds, 122 U. S. App. D. C. 220, 352 F. 2d 696 (1965). Cf. *NLRB* v. *Pipefitters*, 429 U. S. 507 (1977) (valid work preservation agreement does not privilege secondary boycott picketing).

undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit.

The Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957); *NLRB* v. *Insurance Agents*, 361 U. S. 477, 499 (1960). Of course, "recognition of the appropriate sphere of the administrative power . . . obviously cannot exclude all judicial review of the Board's actions." *Ibid.* But we cannot say that the Board has here "[moved] into a new area of regulation which Congress [has] not committed to it." *Ibid.* In *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965), the Court was "unable to find that any fair construction of the provisions relied on by the Board . . . can support its finding of an unfair labor practice . . . . [T]he role assumed by the Board . . . [was] fundamentally inconsistent with the structure of the Act and the function of the sections relied upon." As we have explained, this is not the case here.

The union suggests that the Board's construction of § 8 (f) deserves little or no deference because it is merely an application in the § 8 (b)(7) context of the decision in *R. J. Smith Construction Co.*, 191 N. L. R. B. 693 (1971), which itself was inconsistent with a prior decision, *Oilfield Maintenance Co.*, 142 N. L. R. B. 1384 (1963). It is not at all clear from the latter case, however, that the union involved there had never had majority status. The issue received only passing attention at the time; and the case was distinguished by the Board

in *Ruttmann Construction Co.*, 191 N. L. R. B., at 701 n. 5, decided the same day as *R. J. Smith, supra*, as being "primarily concerned" with "the right of a successor-employer to disavow contracts made by a predecessor with five different unions and substitute the terms of a contract it had with another union." In any event, if *Oilfield Maintenance* represents a view that the majority status of the union executing a prehire agreement may not be challenged in unfair labor practice proceedings, the Board has plainly not adhered to that approach. Its contrary view has been expressed on more than one occasion.[12] An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.

The union argues that the Board's position permitting an employer to repudiate a prehire agreement until the union attains majority support renders the contract for all practical purposes unenforceable, assertedly contrary to this Court's decision in *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962). There, the Court's opinion recognized that § 301 of the Labor Management Relations Act confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority-designated collective-bargaining agents. Section 8 (f) contracts were noted as being in this category. The Court was nevertheless speaking to an issue of jurisdiction. That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with *Lion Dry Goods* for a court to hold that the

[12] In *R. J. Smith*, the Board expressly limited any such implication from *Oilfield Maintenance* to cases where a rebuttable presumption of majority status, or majority status in fact, existed. One-time majority status, coupled with a union security clause that has been enforced, gives rise to a rebuttable presumption of continued majority status, in the Board's view. See *R. J. Smith*, 191 N. L. R. B., at 695.

union's majority standing is subject to litigation in a § 301 suit to enforce a § 8 (f) contract, just as it is in a § 8 (a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable.

It is also clear from what has already been said, that the decision here is not inconsistent with *Building & Construction Trades Council of Santa Barbara County (Sullivan Electric Co.)*, 146 N. L. R. B. 1086 (1964). That case merely permits picketing to enforce contracts with a union actually representing a majority of the employees in the unit. Here, the union did not represent the majority, and in picketing to enforce the prehire agreement, it sought the privileges of a majority representative. The conclusion that § 8 (b)(7) was violated is legally defensible and factually acceptable.

The judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS join, dissenting.

An employer in the construction industry, like any other employer, is under no obligation to bargain with a labor organization that does not represent a majority of his employees.[1] See *NLRB* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (CA2). But unlike other employers, he is free to do so, and may under § 8 (f) sign a contract with a union whose majority status has not been established without risking liability under

[1] Section 8 (a)(5) of the National Labor Relations Act, as set forth in 29 U. S. C. § 158 (a)(5), provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title." Section 9 (a), 29 U. S. C. § 159 (a), provides in pertinent part that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."

§ 8 (a)(1) for interfering with the organizational rights of employees by recognizing a minority union.[2] Cf. *Garment Workers* v. *NLRB*, 366 U. S. 731. When an employer in the construction industry does choose to enter a § 8 (f) prehire agreement, there is nothing in the provisions or policies of national labor law that allows the employer, or the Board, to dismiss the agreement as a nullity. Yet in this case the Court holds that both the Board and the employer may do precisely that.

Whether or not it has the "same stature as a collective-bargaining contract" with a majority union, *ante*, at 341, or may be the subject of a § 8 (a)(5) bargaining order, *R. J. Smith Construction Co.*, 191 N. L. R. B. 693, enf. denied *sub nom. Engineers Local 150* v. *NLRB*, 156 U. S. App. D. C. 294, 480 F. 2d 1186, a § 8 (f) prehire agreement is a contract embodying correlative obligations between two parties. The Board in this case concedes that the employer could lawfully have chosen to adhere to the agreement even though the union had not attained majority status. Thus even if Higdon was under no legal duty to abide by the terms of the prehire agreement, that fact does not establish that Higdon was immune from economic pressure aimed at encouraging it to do so.

Peaceful primary picketing in pursuit of lawful objectives, even by a minority union, is not forbidden by the National Labor Relations Act unless it falls within an express statutory prohibition. *NLRB* v. *Teamsters*, 362 U. S. 274, 282. The

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[2] Section 8 (f) of the National Labor Relations Act, as set forth in 29 U. S. C. § 158 (f), provides in pertinent part:

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement . . . ."

only such statutory provision that the Board believes to be applicable to this case is § 8 (b)(7), which prohibits most organizational and recognitional picketing.[3] But the Board's contention that § 8 (b)(7) prohibits picketing to compel compliance with an existing prehire agreement is not supported by the language of that section or by the Board's prior interpretations of it.

Section 8 (b)(7) prohibits "picketing to force an employer 'to *recognize* or *bargain with* a labor organization as the representative of his employees.'" *Building & Construction Trades Council of Santa Barbara County (Sullivan Electric Co.)*, 146 N. L. R. B. 1086, 1087 (quoting statute, emphasis in Board's opinion). As interpreted by the Board, this section does not prohibit picketing to enforce an existing collective-bargaining contract, even though enforcement would require actual bargaining, since it was intended to proscribe only "picketing having as its target forcing or requiring an employer's *initial acceptance* of the union as the bargaining representative of his employees." *Ibid.* (Emphasis supplied.)

However one may view the relationship established by a § 8 (f) agreement, it is established when the agreement is signed. Only by the most strained interpretation of the terms can picketing to enforce the agreement be said to be for the

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[3] Section 8 (b)(7) of the National Labor Relations Act, as set forth in 29 U. S. C. § 158 (b)(7), provides in pertinent part that it shall be an unfair labor practice for a labor organization

"to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

. . . . .

"(C) where such picketing has been conducted without a petition under section 159 (c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . ."

purpose of gaining "initial acceptance" or recognition.[4] And such a tortured construction would be patently inconsistent with § 13 of the Act, 29 U. S. C. § 163, which "is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act." *NLRB* v. *Teamsters, supra,* at 282.

Since I think neither § 8 (b) (7) nor any other provision of the Act rendered illegal the union's peaceful primary picket protesting Higdon's unilateral and total breach of its prehire agreement, I would affirm the judgment of the Court of Appeals.

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[4] The Board and the Court rely on cases holding that "picketing ostensibly for the purpose of forcing an employer to abide by terms incorporated into agreements between the union and other employers" may in fact have a recognitional purpose in violation of § 8 (b) (7). *Ante,* at 342 n. 7. See, *e. g., Carpenters Local 906,* 204 N. L. R. B. 138; *Hotel & Restaurant Employees (Holiday Inns of America, Inc.),* 169 N. L. R. B. 683. But in none of these cases did the union and the employer have a pre-existing relationship under a § 8 (f) agreement.

CARTER, PUBLIC VEHICLE LICENSE COMMISSIONER OF CHICAGO *v.* MILLER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-1171. Argued November 29-30, 1977—Decided January 17, 1978

547 F. 2d 1314, affirmed by an equally divided Court.

William R. Quinlan argued the cause for petitioner. With him on the briefs were *Daniel Pascale* and *Robert Retke.*

Robert Masur argued the cause for respondent. With him on the briefs were *Alan Freedman, Howard Eglit,* and *David Goldberger.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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*Briefs of *amici curiae* urging affirmance were filed by *William B. Spann, Jr.*, and *Robert B. McKay* for the American Bar Assn.; and by *James R. Madison* and *Norman C. Hile* for the San Francisco Lawyers' Committee for Urban Affairs.

BORDENKIRCHER, PENITENTIARY SUPERINTENDENT *v.* HAYES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76–1334. Argued November 9, 1977—Decided January 18, 1978

The Due Process Clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged. Pp. 360–365.

(a) "[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge* v. *Allison*, 431 U. S. 63, 71. Pp. 361–362.

(b) Though to punish a person because he has done what the law allows violates due process, see *North Carolina* v. *Pearce*, 395 U. S. 711, 738, there is no such element of punishment in the "give-and-take" of plea bargaining as long as the accused is free to accept or reject the prosecutor's offer. Pp. 362–364.

(c) This Court has accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty, and in pursuing that course here the prosecutor did not exceed constitutional bounds. Pp. 364–365.

547 F. 2d 42, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 365. POWELL, J., filed a dissenting opinion, *post*, p. 368.

Robert L. Chenoweth, Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the brief was *Robert F. Stephens*, Attorney General.

J. Vincent Aprile II argued the cause and filed a brief for respondent.*

**John L. Hill*, Attorney General, *David M. Kendall*, First Assistant

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

I

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of 2 to 10 years in prison. Ky. Rev. Stat. § 434.130 (1973) (repealed 1975). After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act,[1] then Ky. Rev. Stat. § 431.190 (1973) (repealed 1975), which would subject Hayes to a mandatory sentence of

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Attorney General, *Joe B. Dibrell, Jr.*, and *Anita Ashton*, Assistant Attorneys General, filed a brief for the State of Texas as *amicus curiae* urging reversal.

Paul N. Halvonik, *Charles M. Sevilla*, *Ephraim Margolin*, and *Sheldon Portman* filed a brief for the California State Public Defender et al. as *amici curiae* urging affirmance.

[1] While cross-examining Hayes during the subsequent trial proceedings the prosecutor described the plea offer in the following language:

"Isn't it a fact that I told you at that time [the initial bargaining session] if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?" Tr. 194.

life imprisonment by reason of his two prior felony convictions.[2] Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. The Kentucky Court of Appeals rejected Hayes' constitutional objections to the enhanced sentence, holding in an unpublished opinion that imprisonment for life with the possibility of parole was constitutionally permissible in light of the previous felonies of which Hayes had been convicted,[3] and that the prosecutor's decision to indict him as a habitual offender was a legitimate use of available leverage in the plea-bargaining process.

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[2] At the time of Hayes' trial the statute provided that "[a]ny person convicted a . . . third time of felony . . . shall be confined in the penitentiary during his life." Ky. Rev. Stat. § 431.190 (1973) (repealed 1975). That statute has been replaced by Ky. Rev. Stat. § 532.080 (Supp. 1977) under which Hayes would have been sentenced to, at most, an indeterminate term of 10 to 20 years. § 532.080 (6)(b). In addition, under the new statute a previous conviction is a basis for enhanced sentencing only if a prison term of one year or more was imposed, the sentence or probation was completed within five years of the present offense, and the offender was over the age of 18 when the offense was committed. At least one of Hayes' prior convictions did not meet these conditions. See n. 3, *infra*.

[3] According to his own testimony, Hayes had pleaded guilty in 1961, when he was 17 years old, to a charge of detaining a female, a lesser included offense of rape, and as a result had served five years in the state reformatory. In 1970 he had been convicted of robbery and sentenced to five years' imprisonment, but had been released on probation immediately.

On Hayes' petition for a federal writ of habeas corpus, the United States District Court for the Eastern District of Kentucky agreed that there had been no constitutional violation in the sentence or the indictment procedure, and denied the writ.[4] The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. *Hayes* v. *Cowan*, 547 F. 2d 42. While recognizing "that plea bargaining now plays an important role in our criminal justice system," *id.*, at 43, the appellate court thought that the prosecutor's conduct during the bargaining negotiations had violated the principles of *Blackledge* v. *Perry*, 417 U. S. 21, which "protect[ed] defendants from the vindictive exercise of a prosecutor's discretion." 547 F. 2d, at 44. Accordingly, the court ordered that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument." *Id.*, at 45. We granted certiorari to consider a constitutional question of importance in the administration of criminal justice. 431 U. S. 953.

II

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty.[5] As a practical matter, in short, this

[4] The opinion of the District Court is unreported.

[5] Compare *United States ex rel. Williams* v. *McMann*, 436 F. 2d 103 (CA2), with *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367, 1370 (CA9). In citing these decisions we do not necessarily endorse them.

case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between "concessions relating to prosecution under an existing indictment," and threats to bring more severe charges not contained in the original indictment—a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness.[6] Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment was influenced by his desire to induce a guilty plea.[7] The ultimate conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

III

We have recently had occasion to observe: "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice sys-

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[6] "Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment . . . he may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial. When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. . . . Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action." 547 F. 2d, at 44–45.

[7] "In this case, a vindictive motive need not be inferred. The prosecutor has admitted it." *Id.*, at 45.

tem. Properly administered, they can benefit all concerned." *Blackledge* v. *Allison*, 431 U. S. 63, 71. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, *Brady* v. *United States*, 397 U. S. 742, 758, the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin* v. *Alabama*, 395 U. S. 238, 242, and the requirement that a prosecutor's plea-bargaining promise must be kept, *Santobello* v. *New York*, 404 U. S. 257, 262. The decision of the Court of Appeals in the present case, however, did not deal with considerations such as these, but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment. Cf. *Brady* v. *United States*, *supra*, at 751 n. 8. For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

IV

This Court held in *North Carolina* v. *Pearce*, 395 U. S. 711, 725, that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a "realistic likelihood of 'vindictiveness.'" *Blackledge* v. *Perry*, 417 U. S., at 27.

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Parker* v. *North Carolina*, 397 U. S. 790,

809 (opinion of BRENNAN, J.). The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, see *Colten* v. *Kentucky*, 407 U. S. 104; *Chaffin* v. *Stynchcombe*, 412 U. S. 17, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. See *Blackledge* v. *Perry*, *supra*, at 26–28.

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, see *North Carolina* v. *Pearce*, *supra*, at 738 (opinion of Black, J.), and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Chaffin* v. *Stynchcombe*, *supra*, at 32–33, n. 20. See *United States* v. *Jackson*, 390 U. S. 570. But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. *Brady* v. *United States*, *supra*, at 752. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. 397 U. S., at 758. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial. See ABA Project on Standards for Criminal Justice, Pleas of Guilty § 3.1 (App. Draft 1968);

Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv. L. Rev. 564 (1977). Cf. *Brady* v. *United States, supra,* at 751; *North Carolina* v. *Alford,* 400 U. S. 25.

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin* v. *Stynchcombe, supra,* at 31. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.[8] Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler* v. *Boles,* 368 U. S. 448, 456. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion,

[8] This case does not involve the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused, see ALI Model Code of Pre-Arraignment Procedure, Commentary to § 350.3, pp. 614–615 (1975), which might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider. Cf. *Brady* v. *United States,* 397 U. S. 742, 758.

may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged. See *Blackledge* v. *Allison*, 431 U. S., at 76.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.[9] And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

I feel that the Court, although purporting to rule narrowly (that is, on "the course of conduct engaged in by the prosecutor in this case," *ante*, this page), is departing from, or at least restricting, the principles established in *North Carolina* v.

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[9] This potential has led to many recommendations that the prosecutor's discretion should be controlled by means of either internal or external guidelines. See ALI Model Code of Pre-Arraignment Procedure for Criminal Justice §§ 350.3 (2)–(3) (1975); ABA Project on Standards for Criminal Justice, The Prosecution Function §§ 2.5, 3.9 (App. Draft 1971); Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1 (1971).

Pearce, 395 U. S. 711 (1969), and in *Blackledge* v. *Perry*, 417 U. S. 21 (1974). If those decisions are sound and if those principles are salutary, as I must assume they are, they require, in my view, an affirmance, not a reversal, of the judgment of the Court of Appeals in the present case.

In Pearce, as indeed the Court notes, *ante*, at 362, it was held that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U. S., at 725. Accordingly, if, on the new trial, the sentence the defendant receives from the court is greater than that imposed after the first trial, it must be explained by reasons "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," other than his having pursued the appeal or collateral remedy. *Id.*, at 726. On the other hand, if the sentence is imposed by the jury and not by the court, if the jury is not aware of the original sentence, and if the second sentence is not otherwise shown to be a product of vindictiveness, *Pearce* has no application. *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973).

Then later, in *Perry*, the Court applied the same principle to prosecutorial conduct where there was a "realistic likelihood of 'vindictiveness.'" 417 U. S., at 27. It held that the requirement of Fourteenth Amendment due process prevented a prosecutor's reindictment of a convicted misdemeanant on a felony charge after the defendant had exercised his right to appeal the misdemeanor conviction and thus to obtain a trial *de novo*. It noted the prosecution's "considerable stake" in discouraging the appeal. *Ibid.*

The Court now says, however, that this concern with vindictiveness is of no import in the present case, despite the difference between five years in prison and a life sentence, because we are here concerned with plea bargaining where there is give-and-take negotiation, and where, it is said, *ante*,

at 363, "there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Yet in this case vindictiveness is present to the same extent as it was thought to be in *Pearce* and in *Perry;* the prosecutor here admitted, see *ante,* at 358 n. 1, that the sole reason for the new indictment was to discourage the respondent from exercising his right to a trial.[1] Even had such an admission not been made, when plea negotiations, conducted in the face of the less serious charge under the first indictment, fail, charging by a second indictment a more serious crime for the same conduct creates "a strong inference" of vindictiveness. As then Judge McCree aptly observed, in writing for a unanimous panel of the Sixth Circuit, the prosecutor initially "makes a discretionary determination that the interests of the state are served by not seeking more serious charges." *Hayes* v. *Cowan,* 547 F. 2d 42, 44 (1976). I therefore do not understand why, as in *Pearce,* due process does not require that the prosecution justify its action on some basis other than discouraging respondent from the exercise of his right to a trial.

Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect. I perceive little difference between vindictiveness after what the Court describes, *ante,* at 362, as the exercise of a "legal right to attack his original conviction,"

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[1] In *Brady* v. *United States,* 397 U. S. 742 (1970), where the Court as a premise accepted plea bargaining as a legitimate practice, it nevertheless observed:

"We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." *Id.,* at 751 n. 8. See also *Colon* v. *Hendry,* 408 F. 2d 864 (CA5 1969); *United States* v. *Jamison,* 164 U. S. App. D. C. 300, 505 F. 2d 407 (1974); *United States* v. *DeMarco,* 401 F. Supp. 505 (CD Cal. 1975), aff'd, 550 F. 2d 1224 (CA9 1977), cert. denied, *post,* p. 827; *United States* v. *Ruesga-Martinez,* 534 F. 2d 1367, 1369 (CA9 1976).

and vindictiveness in the " 'give-and-take negotiation common in plea bargaining.' " Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an accused against it, however it asserts itself. The Court of Appeals rightly so held, and I would affirm the judgment.

It might be argued that it really makes little difference how this case, now that it is here, is decided. The Court's holding gives plea bargaining full sway despite vindictiveness. A contrary result, however, merely would prompt the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain. The consequences to the accused would still be adverse, for then he would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public.[2]

MR. JUSTICE POWELL, dissenting.

Although I agree with much of the Court's opinion, I am not satisfied that the result in this case is just or that the

[2] That prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant, does not add support to today's decision, for this Court, in its approval of the advantages to be gained from plea negotiations, has never openly sanctioned such deliberate overcharging or taken such a cynical view of the bargaining process. See *North Carolina* v. *Alford*, 400 U. S. 25 (1970); *Santobello* v. *New York*, 404 U. S. 257 (1971). Normally, of course, it is impossible to show that this is what the prosecutor is doing, and the courts necessarily have deferred to the prosecutor's exercise of discretion in initial charging decisions.

Even if overcharging is to be sanctioned, there are strong reasons of fairness why the charges should be presented at the beginning of the bargaining process, rather than as a filliped threat at the end. First, it means that a prosecutor is required to reach a charging decision without

conduct of the plea bargaining met the requirements of due process.

Respondent was charged with the uttering of a single forged check in the amount of $88.30. Under Kentucky law, this offense was punishable by a prison term of from 2 to 10 years, apparently without regard to the amount of the forgery. During the course of plea bargaining, the prosecutor offered respondent a sentence of five years in consideration of a guilty plea. I observe, at this point, that five years in prison for the offense charged hardly could be characterized as a generous offer. Apparently respondent viewed the offer in this light and declined to accept it; he protested that he was innocent and insisted on going to trial. Respondent adhered to this position even when the prosecutor advised that he would seek

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any knowledge of the particular defendant's willingness to plead guilty; hence the defendant who truly believes himself to be innocent, and wishes for that reason to go to trial, is not likely to be subject to quite such a devastating gamble since the prosecutor has fixed the incentives for the average case.

Second, it is healthful to keep charging practices visible to the general public, so that political bodies can judge whether the policy being followed is a fair one. Visibility is enhanced if the prosecutor is required to lay his cards on the table with an indictment of public record at the beginning of the bargaining process, rather than making use of unrecorded verbal warnings of more serious indictments yet to come.

Finally, I would question whether it is fair to pressure defendants to plead guilty by threat of reindictment on an enhanced charge for the same conduct when the defendant has no way of knowing whether the prosecutor would indeed be entitled to bring him to trial on the enhanced charge. Here, though there is no dispute that respondent met the then-current definition of a habitual offender under Kentucky law, it is conceivable that a properly instructed Kentucky grand jury, in response to the same considerations that ultimately moved the Kentucky Legislature to amend the habitual offender statute, would have refused to subject respondent to such an onerous penalty for his forgery charge. There is no indication in the record that, once the new indictment was obtained, respondent was given another chance to plead guilty to the forged check charge in exchange for a five-year sentence.

a new indictment under the State's Habitual Criminal Act which would subject respondent, if convicted, to a mandatory life sentence because of two prior felony convictions.

The prosecutor's initial assessment of respondent's case led him to forgo an indictment under the habitual criminal statute. The circumstances of respondent's prior convictions are relevant to this assessment and to my view of the case. Respondent was 17 years old when he committed his first offense. He was charged with rape but pleaded guilty to the lesser included offense of "detaining a female." One of the other participants in the incident was sentenced to life imprisonment. Respondent was sent not to prison but to a reformatory where he served five years. Respondent's second offense was robbery. This time he was found guilty by a jury and was sentenced to five years in prison, but he was placed on probation and served no time. Although respondent's prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves did not result in imprisonment; yet the addition of a conviction on a charge involving $88.30 subjected respondent to a mandatory sentence of imprisonment for life.[1] Persons convicted of rape and murder often are not punished so severely.

No explanation appears in the record for the prosecutor's decision to escalate the charge against respondent other than respondent's refusal to plead guilty. The prosecutor has conceded that his purpose was to discourage respondent's assertion of constitutional rights, and the majority accepts this characterization of events. See *ante*, at 358 n. 1, 364.

It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the

[1] It is suggested that respondent will be eligible for parole consideration after serving 15 years.

exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that Act, as unreasonable as it would have seemed.[2] But here the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute.[3] I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.

There may be situations in which a prosecutor would be fully justified in seeking a fresh indictment for a more serious offense. The most plausible justification might be that it would have been reasonable and in the public interest initially

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[2] The majority suggests, *ante*, at 360–361, that this case cannot be distinguished from the case where the prosecutor initially obtains an indictment under an enhancement statute and later agrees to drop the enhancement charge in exchange for a guilty plea. I would agree that these two situations would be alike *only if* it were assumed that the hypothetical prosecutor's decision to charge under the enhancement statute was occasioned not by consideration of the public interest but by a strategy to discourage the defendant from exercising his constitutional rights. In theory, I would condemn both practices. In practice, the hypothetical situation is largely unreviewable. The majority's view confuses the propriety of a particular exercise of prosecutorial discretion with its unreviewability. In the instant case, however, we have no problem of proof.

[3] Indeed, the Kentucky Legislature subsequently determined that the habitual criminal statute under which respondent was convicted swept too broadly and did not identify adequately the kind of prior convictions that should trigger its application. At least one of respondent's two prior convictions would not satisfy the criteria of the revised statute; and the impact of the statute, when applied, has been reduced significantly in situations, like this one, where the third offense is relatively minor. See *ante*, at 359 n. 2.

to have charged the defendant with the greater offense. In most cases a court could not know why the harsher indictment was sought, and an inquiry into the prosecutor's motive would neither be indicated nor likely to be fruitful. In those cases, I would agree with the majority that the situation would not differ materially from one in which the higher charge was brought at the outset. See *ante*, at 360–361.

But this is not such a case. Here, any inquiry into the prosecutor's purpose is made unnecessary by his candid acknowledgment that he threatened to procure and in fact procured the habitual criminal indictment because of respondent's insistence on exercising his constitutional rights. We have stated in unequivocal terms, in discussing *United States* v. *Jackson*, 390 U. S. 570 (1968), and *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), that "*Jackson* and *Pearce* are clear and subsequent cases have not dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 32 n. 20 (1973). And in *Brady* v. *United States*, 397 U. S. 742 (1970), we drew a distinction between the situation there approved and the "situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." *Id.*, at 751 n. 8.

The plea-bargaining process, as recognized by this Court, is essential to the functioning of the criminal-justice system. It normally affords genuine benefits to defendants as well as to society. And if the system is to work effectively, prosecutors must be accorded the widest discretion, within constitutional limits, in conducting bargaining. Cf. n. 2, *supra*. This is especially true when a defendant is represented by counsel and presumably is fully advised of his rights. Only in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion. In this case, the prosecutor's actions denied respondent due

process because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights. Implementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion. I would affirm the opinion of the Court of Appeals on the facts of this case.

ZABLOCKI, MILWAUKEE COUNTY CLERK *v.* REDHAIL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 76-879. Argued October 4, 1977—Decided January 18, 1978

Wisconsin statute providing that any resident of that State "having minor issue not in his custody and which he is under obligation to support by any court order or judgment" may not marry without a court approval order, which cannot be granted absent a showing that the support obligation has been met and that children covered by the support order "are not then and are not likely thereafter to become public charges," *held* to violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 383–391.

(a) Since the right to marry is of fundamental importance, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1, and the statutory classification involved here significantly interferes with the exercise of that right, "critical examination" of the state interests advanced in support of the classification is required. *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312, 314. Pp. 383–387.

(b) The state interests assertedly served by the challenged statute unnecessarily impinge on the right to marry. If the statute is designed to furnish an opportunity to counsel persons with prior child-support obligations before further such obligations are incurred, it neither expressly requires counseling nor provides for automatic approval after counseling is completed. The statute cannot be justified as encouraging an applicant to support his children. By the proceeding the State, which already possesses numerous other means for exacting compliance with support obligations, merely prevents the applicant from getting married, without ensuring support of the applicant's prior children. Though it is suggested that the statute protects the ability of marriage applicants to meet prior support obligations before new ones are incurred, the statute is both underinclusive (as it does not limit new financial commitments other than those arising out of the contemplated marriage) and overinclusive (since the new spouse may better the applicant's financial situation). Pp. 388–390.

418 F. Supp. 1061, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and BLACKMUN, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 391. STEWART, J., *post*, p. 391, POWELL, J., *post*, p. 396, and STEVENS, J., *post*, p. 403, filed opinions concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, *post*, p. 407.

Ward L. Johnson, Jr., Assistant Attorney General of Wisconsin, argued the cause for appellant. With him on the briefs were *Bronson C. La Follette*, Attorney General, *Robert P. Russell*, and *John R. Devitt*.

Robert H. Blondis argued the cause and filed briefs for appellee.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of a Wisconsin statute, Wis. Stat. §§ 245.10 (1), (4), (5) (1973), which provides that members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry. The class is defined by the statute to include any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment." The statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order "are not then and are not likely thereafter to become public charges." No marriage license may lawfully be issued in Wisconsin to a person covered by the statute, except upon court order; any marriage entered into without compliance with § 245.10 is declared void; and persons acquiring marriage licenses in violation of the section are subject to criminal penalties.[1]

**Terry W. Rose* filed a brief for the Wisconsin Civil Liberties Union Foundation, Inc., as *amicus curiae* urging affirmance.

[1] Wisconsin Stat. § 245.10 provides in pertinent part:

"(1) No Wisconsin resident having minor issue not in his custody and

After being denied a marriage license because of his failure to comply with § 245.10, appellee brought this class action under 42 U. S. C. § 1983, challenging the statute as violative

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which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding . . . or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless

of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and seeking declaratory and injunctive relief. The United States District Court for the Eastern District of Wisconsin held the statute unconstitutional under the Equal Protection Clause and enjoined its enforcement. 418 F. Supp. 1061 (1976). We noted probable jurisdiction, 429 U. S. 1089 (1977), and we now affirm.

I

Appellee Redhail is a Wisconsin resident who, under the terms of § 245.10, is unable to enter into a lawful marriage in Wisconsin or elsewhere so long as he maintains his Wisconsin residency. The facts, according to the stipulation filed by the parties in the District Court, are as follows. In January 1972, when appellee was a minor and a high school student, a paternity action was instituted against him in Milwaukee County Court, alleging that he was the father of a baby girl

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a certified copy of a court order permitting such marriage is filed with said county clerk.

. . . . .

"(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

"(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) [providing that out-of-state marriages to circumvent Wisconsin law are void] are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

The criminal penalties for violation of § 245.10 are set forth in Wis. Stat. § 245.30 (1) (f) (1973). See *State* v. *Mueller*, 44 Wis. 2d 387, 171 N. W. 2d 414 (1969) (upholding criminal prosecution for failure to comply with § 245.10).

born out of wedlock on July 5, 1971. After he appeared and admitted that he was the child's father, the court entered an order on May 12, 1972, adjudging appellee the father and ordering him to pay $109 per month as support for the child until she reached 18 years of age. From May 1972 until August 1974, appellee was unemployed and indigent, and consequently was unable to make any support payments.[2]

On September 27, 1974, appellee filed an application for a marriage license with appellant Zablocki, the County Clerk of Milwaukee County,[3] and a few days later the application was denied on the sole ground that appellee had not obtained a court order granting him permission to marry, as required by § 245.10. Although appellee did not petition a state court thereafter, it is stipulated that he would not have been able to satisfy either of the statutory prerequisites for an order granting permission to marry. First, he had not satisfied his support obligations to his illegitimate child, and as of December 1974 there was an arrearage in excess of $3,700. Second, the child had been a public charge since her birth, receiving benefits under the Aid to Families with Dependent Children program. It is stipulated that the child's benefit payments were such that she would have been a public charge even if appellee had been current in his support payments.

On December 24, 1974, appellee filed his complaint in the District Court, on behalf of himself and the class of all Wisconsin residents who had been refused a marriage license pursuant to § 245.10 (1) by one of the county clerks in Wisconsin. Zablocki was named as the defendant, individually

[2] The record does not indicate whether appellee obtained employment subsequent to August 1974.

[3] Under Wisconsin law, "[m]arriage may be validly solemnized and contracted [within the] state only after a license has been issued therefor," Wis. Stat. § 245.16 (1973), and (with an exception not relevant here) the license must be obtained from "the county clerk of the county in which one of the parties has resided for at least 30 days immediately prior to making application therefor," § 245.05.

and as representative of a class consisting of all county clerks in the State. The complaint alleged, among other things, that appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time. The statute was attacked on the grounds that it deprived appellee, and the class he sought to represent, of equal protection and due process rights secured by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

A three-judge court was convened pursuant to 28 U. S. C. §§ 2281, 2284. Appellee moved for certification of the plaintiff and defendant classes named in his complaint, and by order dated February 20, 1975, the plaintiff class was certified under Fed. Rule Civ. Proc. 23 (b)(2).[4] After the parties filed the stipulation of facts, and briefs on the merits, oral argument was heard in the District Court on June 23, 1975, with a representative from the Wisconsin Attorney General's office participating in addition to counsel for the parties.

The three-judge court handed down a unanimous decision on August 31, 1976. The court ruled, first, that it was not required to abstain from decision under the principles set forth in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), and *Younger* v. *Harris*, 401 U. S. 37 (1971), since there was no pending state-court proceeding that could be frustrated by the declaratory and injunctive relief requested.[5] Second, the court held

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[4] The order defined the plaintiff class as follows:

"All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to § 245.10 (1), Wis. Stats. (1971)."

The order also established a briefing schedule on appellee's motion for certification of a defendant class. Although appellee thereafter filed a brief in support of the motion, appellant never submitted a brief in opposition.

[5] 418 F. Supp. 1061, 1064–1065. The possibility that abstention might

that the class of all county clerks in Wisconsin was a proper defendant class under Rules 23 (a) and (b)(2), and that neither Rule 23 nor due process required prejudgment notice to the members of the plaintiff or the defendant class.[6]

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be required under our decision in *Huffman* v. *Pursue, Ltd.*, was raised by the District Court, *sua sponte*, at argument before that court. Appellee subsequently filed a memorandum contending that abstention was not required; appellant did not submit a response. Appellant now argues, on this appeal, that the District Court failed to consider the "doctrine of federalism" set forth in *Younger* and *Huffman*. According to appellant, proper consideration of this doctrine would have led the District Court to require appellee to bring suit first in the state courts, in order to give those courts the initial opportunity to pass on his constitutional attack against § 245.10. We cannot agree.

First, the District Court was correct in finding *Huffman* and *Younger* inapplicable, since there was no pending state-court proceeding in which appellee could have challenged the statute. See *Wooley* v. *Maynard*, 430 U. S. 705, 710–711 (1977). Second, there are no ambiguities in the statute for the state courts to resolve, and—absent issues of state law that might affect the posture of the federal constitutional claims—this Court has uniformly held that individuals seeking relief under 42 U. S. C. § 1983 need not present their federal constitutional claims in state court before coming to a federal forum. See, *e. g.*, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437–439 (1971); *Zwickler* v. *Koota*, 389 U. S. 241, 245–252 (1967). See also *Huffman* v. *Pursue, Ltd.*, 420 U. S., at 609–610, n. 21.

Appellant also contends on this appeal, for the first time, that the District Court should have abstained out of "regard for the independence of state governments in carrying out their domestic policy." Brief for Appellant 16, citing *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 317–318 (1943). Unlike *Burford*, however, this case does not involve complex issues of state law, resolution of which would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 814–815 (1976). And there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.

[6] 418 F. Supp., at 1065–1068. Appellant has not appealed the District Court's finding that the defendant class satisfied the requirements of Rules 23 (a) and (b)(2), the court's definition of the class to include all county clerks in Wisconsin, or the requirement that appellant send a copy of

On the merits, the three-judge panel analyzed the challenged statute under the Equal Protection Clause and concluded that "strict scrutiny" was required because the classification created by the statute infringed upon a fundamental right, the right to marry.[7] The court then proceeded to evaluate the interests advanced by the State to justify the statute, and, finding that the classification was not necessary for the achievement of those interests, the court held the statute invalid and enjoined the county clerks from enforcing it.[8]

Appellant brought this direct appeal pursuant to 28 U. S. C.

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the judgment to each of the county clerks, and those issues are therefore not before us. Appellant does claim on this appeal that due process required prejudgment notice to the members of the defendant class if the judgment was to be binding on them. As this issue has been framed, however, we cannot perceive appellant's "personal stake in the outcome," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), and we therefore hold that appellant lacks standing to raise the claim. Appellant would be bound, regardless of what we concluded as to the judgment's binding effect on absent members of the defendant class, and appellant has not asserted that he was injured in any way by the maintenance of this suit as a defendant class action. Indeed, appellant never filed a brief in the District Court in opposition to the defendant class, despite being invited to do so, see n. 4, *supra*, and the notice issue was briefed for the first time on this appeal, after the Wisconsin Attorney General took over as lead counsel for appellant. In these circumstances, the absent class members must be content to assert their due process rights for themselves, through collateral attack or otherwise. See *Hansberry* v. *Lee*, 311 U. S. 32 (1940); Advisory Committee Notes on 1966 Amendment to Rule 23, 28 U. S. C. App., p. 7768, citing Restatement of Judgments § 86, Comment (h), § 116 (1942). We note, in any event, that in light of our disposition of this case and the recent revision of Wisconsin's Family Code, see n. 9, *infra*, the question of binding effect on the absent members may be wholly academic.

[7] 418 F. Supp., at 1068–1071. The court found an additional justification for applying strict scrutiny in the fact that the statute discriminates on the basis of wealth, absolutely denying individuals the opportunity to marry if they lack sufficient financial resources to make the showing required by the statute. *Id.*, at 1070, citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 20 (1973).

[8] 418 F. Supp., at 1071–1073.

§ 1253, claiming that the three-judge court erred in finding §§ 245.10 (1), (4), (5) invalid under the Equal Protection Clause. Appellee defends the lower court's equal protection holding and, in the alternative, urges affirmance of the District Court's judgment on the ground that the statute does not satisfy the requirements of substantive due process. We agree with the District Court that the statute violates the Equal Protection Clause.[9]

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[9] Counsel for appellee informed us at oral argument that appellee was married in Illinois some time after argument on the merits in the District Court, but prior to judgment. Tr. of Oral Arg. 23, 30–31. This development in no way moots the issues before us. First, appellee's individual claim is unaffected, since he is still a Wisconsin resident and the Illinois marriage is consequently void under the provisions of §§ 245.10 (1), (4), (5). See *State* v. *Mueller*, 44 Wis. 2d 387, 171 N. W. 2d 414 (1969) (§ 245.10 has extraterritorial effect with respect to Wisconsin residents). Second, regardless of the current status of appellee's individual claim, the dispute over the statute's constitutionality remains live with respect to members of the class appellee represents, and the Illinois marriage took place well after the class was certified. See *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 752–757 (1976); *Sosna* v. *Iowa*, 419 U. S. 393, 397–403 (1975).

After argument in this Court, the Acting Governor of Wisconsin signed into law a comprehensive revision of the State's marriage laws, effective February 1, 1978. 1977 Wis. Laws, ch. 105, Wis. Legis. Serv. (West 1977). The revision added a new section (§ 245.105) which appears to be a somewhat narrower version of § 245.10. Enactment of this new provision also does not moot our inquiry into the constitutionality of § 245.10. By its terms, the new section "shall be enforced only when the provisions of § 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court." § 245.105 (8). As we read this somewhat unusual proviso, and as it was explained to us at argument by the representative of the Wisconsin Attorney General, Tr. of Oral Arg. 4–10, the new section is meant only to serve as a stopgap during such time as enforcement of § 245.10 is barred by court order. Were we to vacate the District Court's injunction on this appeal, § 245.10 would go back into full force and effect; accordingly, the dispute over its validity is quite live. We express no judgment on the constitutionality of the new section.

II

In evaluating §§ 245.10 (1), (4), (5) under the Equal Protection Clause, "we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 253 (1974). Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is required. *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312, 314 (1976); see, *e. g.*, *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17 (1973).

The leading decision of this Court on the right to marry is *Loving* v. *Virginia*, 388 U. S. 1 (1967). In that case, an interracial couple who had been convicted of violating Virginia's miscegenation laws challenged the statutory scheme on both equal protection and due process grounds. The Court's opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. *Id.*, at 11–12. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry. The Court's language on the latter point bears repeating:

> "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.*, at 12, quoting *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942).

Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard* v. *Hill*, 125 U. S. 190 (1888), the Court characterized marriage as "the most important relation in life," *id.*, at 205, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.*, at 211. In *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause, *id.*, at 399, and in *Skinner* v. *Oklahoma ex rel. Williamson*, *supra*, marriage was described as "fundamental to the very existence and survival of the race," 316 U. S., at 541.

More recent decisions have established that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause. In *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the Court observed:

> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

See also *id.*, at 495 (Goldberg, J., concurring); *id.*, at 502–503 (WHITE, J., concurring in judgment).

Cases subsequent to *Griswold* and *Loving* have routinely categorized the decision to marry as among the personal decisions protected by the right of privacy. See generally *Whalen* v. *Roe*, 429 U. S. 589, 598–600, and nn. 23–26 (1977). For

example, last Term in *Carey* v. *Population Services International*, 431 U. S. 678 (1977), we declared:

> "While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U. S., at 453–454; *id.*, at 460, 463–465 (WHITE, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska*, [262 U. S. 390, 399 (1923)].'" *Id.*, at 684–685, quoting *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973).

See also *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 842–844 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977); *Paul* v. *Davis*, 424 U. S. 693, 713 (1976).[10]

[10] Further support for the fundamental importance of marriage is found in our decisions dealing with rights of access to courts in civil cases. In *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), we wrote that "marriage involves interests of basic importance in our society," *id.*, at 376, and held that filing fees for divorce actions violated the due process rights of indigents unable to pay the fees. Two years later, in *United States* v. *Kras*, 409 U. S. 434 (1973), the Court concluded that filing fees in bankruptcy actions did not deprive indigents of due process or equal protection. *Boddie* was distinguished on several grounds, including the following: "The denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occa-

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see *Roe* v. *Wade, supra,* or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings, see *Trimble* v. *Gordon,* 430 U. S. 762, 768–770, and n. 13 (1977); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 175–176 (1972). Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.[11]

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. See *Califano* v. *Jobst, ante,* p. 47;

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sions we have recognized the fundamental importance of these interests under our Constitution. See, for example, *Loving* v. *Virginia* . . . ." 409 U. S., at 444.

See also *id.,* at 446 ("Bankruptcy is hardly akin to free speech or marriage . . . [,] rights . . . that the Court has come to regard as fundamental").

[11] Wisconsin punishes fornication as a criminal offense:

"Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both." Wis. Stat. § 944.15 (1973).

n. 12, *infra*. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.

Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses. Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.[12]

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[12] The directness and substantiality of the interference with the freedom to marry distinguish the instant case from *Califano* v. *Jobst*, *ante*, p. 47. In *Jobst*, we upheld sections of the Social Security Act providing, *inter alia*, for termination of a dependent child's benefits upon marriage to an individual not entitled to benefits under the Act. As the opinion for the Court expressly noted, the rule terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." *Ante*, at 54. The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and—notwithstanding our Brother REHNQUIST's imaginative recasting of the case, see dissenting opinion, *post*, at 408—there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages. Indeed, the provisions had not deterred the individual who challenged the statute from getting married, even though he and his wife were both disabled. See *Califano* v. *Jobst*, *ante*, at 48. See also *ante*, at 57 n. 17 (because of availability of other federal benefits, total payments to the Jobsts after marriage were only $20 per month less than they would have been had Mr. Jobst's child benefits not been terminated).

III

When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. See, *e. g.*, *Carey* v. *Population Services International*, 431 U. S., at 686; *Memorial Hospital* v. *Maricopa County*, 415 U. S., at 262–263; *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 16–17; *Bullock* v. *Carter*, 405 U. S. 134, 144 (1972). Appellant asserts that two interests are served by the challenged statute: the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected. We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.

There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations.[13] Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed.[14] The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court,[15] and thus it can

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[13] See Wisconsin Legislative Council Notes, 1959, reprinted following Wis. Stat. Ann. § 245.10 (Supp. 1977–1978); 5 Wisconsin Legislative Council, General Report 68 (1959).

[14] See *ibid.*

[15] Although the statute as originally enacted in 1959 did not provide for automatic granting of permission, it did allow the court to grant

hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place—a fact as to which there is no evidence in the record—this interest obviously cannot support the withholding of court permission to marry once counseling is completed.

With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements. At argument, appellant's counsel suggested that, since permission to marry cannot be granted unless the applicant shows that he has satisfied his court-determined support obligations to the prior children and that those children will not become public charges, the statute provides incentive for the applicant to make support payments to his children. Tr. of Oral Arg. 17–20. This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.

First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via

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permission if it found "good cause" for doing so, even in the absence of a showing that support obligations were being met. 1959 Wis. Laws, ch. 595, § 17. In 1961, the good-cause provision was deleted, and the requirement of a showing that the out-of-custody children are not and will not become public charges was added. 1961 Wis. Laws, ch. 505, § 11.

wage assignments, civil contempt proceedings, and criminal penalties.[16] And, if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders.

There is also some suggestion that § 245.10 protects the ability of marriage applicants to meet support obligations to prior children by preventing the applicants from incurring new support obligations. But the challenged provisions of § 245.10 are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations. And, although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee's case. Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate children.

The statutory classification created by §§ 245.10 (1), (4),

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[16] Wisconsin statutory provisions for civil enforcement of support obligations to children from a prior marriage include §§ 247.232 (wage assignment), 247.265 (same), and 295.03 (civil contempt). Support obligations arising out of paternity actions may be civilly enforced under §§ 52.21 (2) (wage assignment) and 52.40 (civil contempt). See also § 52.39. In addition, failure to meet support obligations may result in conviction of the felony offense of abandonment of a minor child, § 52.05, or the misdemeanor of failure to support a minor child, § 52.055.

(5) thus cannot be justified by the interests advanced in support of it. The judgment of the District Court is, accordingly,

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I join MR. JUSTICE MARSHALL's opinion for the Court. With all deference, MR. JUSTICE STEVENS' opinion does not persuade me that the analysis in the Court's opinion is in any significant way inconsistent with the Court's unanimous holding in *Califano* v. *Jobst, ante,* p. 47. Unlike the intentional and substantial interference with the right to marry effected by the Wisconsin statute at issue here, the Social Security Act provisions challenged in *Jobst* did not constitute an "attempt to interfere with the individual's freedom to make a decision as important as marriage," *Califano* v. *Jobst, ante,* at 54, and, at most, had an indirect impact on that decision. It is with this understanding that I join the Court's opinion today.

MR. JUSTICE STEWART, concurring in the judgment.

I cannot join the opinion of the Court. To hold, as the Court does, that the Wisconsin statute violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications. *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 59 (concurring opinion). The paradigm of its violation is, of course, classification by race. *McLaughlin* v. *Florida,* 379 U. S. 184; *Loving* v. *Virginia,* 388 U. S. 1, 13 (concurring opinion).

Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. But to say that it thereby creates "classifications" in the equal protection sense strikes me as little short of fantasy. The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected

freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.

I

I do not agree with the Court that there is a "right to marry" in the constitutional sense. That right, or more accurately that privilege,[1] is under our federal system peculiarly one to be defined and limited by state law. *Sosna* v. *Iowa*, 419 U. S. 393, 404. A State may not only "significantly interfere with decisions to enter into the marital relationship," [2] but may in many circumstances absolutely prohibit it. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. But, just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.

The Constitution does not specifically mention freedom to marry, but it is settled that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment embraces more than those freedoms expressly enumerated in the Bill of Rights. See *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238–239; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–400. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 629–630; *United States* v. *Guest*, 383 U. S. 745, 757–758; *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505; *Kent* v. *Dulles*, 357 U. S. 116, 127; *Truax* v. *Raich*, 239 U. S. 33, 41. And the decisions of this Court

[1] See Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L. J. 16 (1913).

[2] See *ante*, at 386.

have made clear that freedom of personal choice in matters of marriage and family life is one of the liberties so protected. *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639; *Roe* v. *Wade*, 410 U. S. 113, 152–153; *Loving* v. *Virginia*, *supra*, at 12; *Griswold* v. *Connecticut*, 381 U. S. 479, 485–486; *Pierce* v. *Society of Sisters*, *supra*; *Meyer* v. *Nebraska*, *supra*. See also *Prince* v. *Massachusetts*, 321 U. S. 158; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541.

It is evident that the Wisconsin law now before us directly abridges that freedom. The question is whether the state interests that support the abridgment can overcome the substantive protections of the Constitution.

The Wisconsin law makes permission to marry turn on the payment of money in support of one's children by a previous marriage or liaison. Those who cannot show both that they have kept up with their support obligations and that their children are not and will not become wards of the State are altogether prohibited from marrying.

If Wisconsin had said that no one could marry who had not paid all of the fines assessed against him for traffic violations, I suppose the constitutional invalidity of the law would be apparent. For while the state interest would certainly be legitimate, that interest would be both disproportionate and unrelated to the restriction of liberty imposed by the State. But the invalidity of the law before us is hardly so clear, because its restriction of liberty seems largely to be imposed only on those who have abused the same liberty in the past.

Looked at in one way, the law may be seen as simply a collection device additional to those used by Wisconsin and other States for enforcing parental support obligations. But since it operates by denying permission to marry, it also clearly reflects a legislative judgment that a person should not be permitted to incur new family financial obligations until he has fulfilled those he already has. Insofar as this judgment is paternalistic rather than punitive, it manifests a concern

for the economic well-being of a prospective marital household. These interests are legitimate concerns of the State. But it does not follow that they justify the absolute deprivation of the benefits of a legal marriage.

On several occasions this Court has held that a person's inability to pay money demanded by the State does not justify the total deprivation of a constitutionally protected liberty. In *Boddie* v. *Connecticut*, 401 U. S. 371, the Court held that the State's legitimate purposes in collecting filing fees for divorce actions were insufficient under the Due Process Clause to deprive the indigent of access to the courts where that access was necessary to dissolve the marital relationship. In *Tate* v. *Short*, 401 U. S. 395, and *Williams* v. *Illinois*, 399 U. S. 235, the Court held that an indigent offender could not have his term of imprisonment increased, and his liberty curtailed, simply by reason of his inability to pay a fine.

The principle of those cases applies here as well. The Wisconsin law makes no allowance for the truly indigent. The State flatly denies a marriage license to anyone who cannot afford to fulfill his support obligations and keep his children from becoming wards of the State. We may assume that the State has legitimate interests in collecting delinquent support payments and in reducing its welfare load. We may also assume that, as applied to those who can afford to meet the statute's financial requirements but choose not to do so, the law advances the State's objectives in ways superior to other means available to the State. The fact remains that some people simply cannot afford to meet the statute's financial requirements. To deny these people permission to marry penalizes them for failing to do that which they cannot do. Insofar as it applies to indigents, the state law is an irrational means of achieving these objectives of the State.

As directed against either the indigent or the delinquent parent, the law is substantially more rational if viewed as a means of assuring the financial viability of future marriages.

In this context, it reflects a plausible judgment that those who have not fulfilled their financial obligations and have not kept their children off the welfare rolls in the past are likely to encounter similar difficulties in the future. But the State's legitimate concern with the financial soundness of prospective marriages must stop short of telling people they may not marry because they are too poor or because they might persist in their financial irresponsibility. The invasion of constitutionally protected liberty and the chance of erroneous prediction are simply too great. A legislative judgment so alien to our traditions and so offensive to our shared notions of fairness offends the Due Process Clause of the Fourteenth Amendment.

II

In an opinion of the Court half a century ago, Mr. Justice Holmes described an equal protection claim as "the usual last resort of constitutional arguments." *Buck* v. *Bell,* 274 U. S. 200, 208. Today equal protection doctrine has become the Court's chief instrument for invalidating state laws. Yet, in a case like this one, the doctrine is no more than substantive due process by another name.

Although the Court purports to examine the bases for legislative classifications and to compare the treatment of legislatively defined groups, it actually erects substantive limitations on what States may do. Thus, the effect of the Court's decision in this case is not to require Wisconsin to draw its legislative classifications with greater precision or to afford similar treatment to similarly situated persons. Rather, the message of the Court's opinion is that Wisconsin may not use its control over marriage to achieve the objectives of the state statute. Such restrictions on basic governmental power are at the heart of substantive due process.

The Court is understandably reluctant to rely on substantive due process. See *Roe* v. *Wade,* 410 U. S. at 167–168 (concurring opinion). But to embrace the essence of that doctrine under the guise of equal protection serves no purpose

but obfuscation. "[C]ouched in slogans and ringing phrases," the Court's equal protection doctrine shifts the focus of the judicial inquiry away from its proper concerns, which include "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams* v. *Illinois, supra,* at 260 (Harlan, J., concurring in result).

To conceal this appropriate inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.

MR. JUSTICE POWELL, concurring in the judgment.

I concur in the judgment of the Court that Wisconsin's restrictions on the exclusive means of creating the marital bond, erected by Wis. Stat. §§ 245.10 (1), (4), and (5) (1973), cannot meet applicable constitutional standards. I write separately because the majority's rationale sweeps too broadly in an area which traditionally has been subject to pervasive state regulation. The Court apparently would subject all state regulation which "directly and substantially" interferes with the decision to marry in a traditional family setting to "critical examination" or "compelling state interest" analysis. Presumably, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Ante,* at 386. The Court does not present, however, any principled means for distinguishing between the two types of regulations. Since state regulation in

this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.

I

On several occasions, the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974). Our decisions indicate that the guarantee of personal privacy or autonomy secured against unjustifiable governmental interference by the Due Process Clause "has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967) . . . ." *Roe* v. *Wade*, 410 U. S. 113, 152 (1973). "While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage. . . .'" *Carey* v. *Population Services International*, 431 U. S. 678, 684–685 (1977).

Thus, it is fair to say that there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government. But the Court has yet to hold that all regulation touching upon marriage implicates a "fundamental right" triggering the most exacting judicial scrutiny.[1]

[1] Although the cases cited in the text indicate that there is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude, they do not necessarily suggest that the same barrier of justification blocks regulation of the conditions of entry into or the dissolution of the marital bond. See generally Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1429–1432 (1974).

The principal authority cited by the majority is *Loving* v. *Virginia*, 388 U. S. 1 (1967). Although *Loving* speaks of the "freedom to marry" as "one of the vital personal rights essential to the orderly pursuit of happiness by free men," the Court focused on the miscegenation statute before it. Mr. Chief Justice Warren stated:

> "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942). See also *Maynard* v. *Hill*, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.*, at 12.

Thus, *Loving* involved a denial of a "fundamental freedom" on a wholly unsupportable basis—the use of classifications "directly subversive of the principle of equality at the heart of the Fourteenth Amendment . . . ." It does not speak to the level of judicial scrutiny of, or governmental justification for, "supportable" restrictions on the "fundamental freedom" of individuals to marry or divorce.

In my view, analysis must start from the recognition of domestic relations as "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U. S. 393, 404 (1975). The marriage relation traditionally has been subject to regulation, initially by the ecclesiastical authorities, and later by the secular state. As early as

Pennoyer v. *Neff*, 95 U. S. 714, 734–735 (1878), this Court noted that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard* v. *Hill*, 125 U. S. 190, 205 (1888).

State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A "compelling state purpose" inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.

II

State power over domestic relations is not without constitutional limits. The Due Process Clause requires a showing of justification "when the government intrudes on choices concerning family living arrangements" in a manner which is contrary to deeply rooted traditions. *Moore* v. *East Cleveland*, 431 U. S. 494, 499, 503–504 (1977) (plurality opinion). Cf. *Smith* v. *Organization of Foster Families*, 431 U. S. 816,

842–847 (1977). Due process constraints also limit the extent to which the State may monopolize the process of ordering certain human relationships while excluding the truly indigent from that process. *Boddie* v. *Connecticut*, 401 U. S. 371 (1971). Furthermore, under the Equal Protection Clause the means chosen by the State in this case must bear " 'a fair and substantial relation' " to the object of the legislation. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971), quoting *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920); *Craig* v. *Boren*, 429 U. S. 190, 210–211 (1976) (POWELL, J., concurring).

The Wisconsin measure in this case does not pass muster under either due process or equal protection standards. Appellant identifies three objectives which are supposedly furthered by the statute in question: (i) a counseling function; (ii) an incentive to satisfy outstanding support obligations; and (iii) a deterrent against incurring further obligations. The opinion of the Court amply demonstrates that the asserted counseling objective bears no relation to this statute. *Ante*, at 388–389. No further discussion is required here.

The so-called "collection device" rationale presents a somewhat more difficult question. I do not agree with the suggestion in the Court's opinion that a State may never condition the right to marry on satisfaction of existing support obligations simply because the State has alternative methods of compelling such payments. To the extent this restriction applies to persons who are able to make the required support payments but simply wish to shirk their moral and legal obligation, the Constitution interposes no bar to this additional collection mechanism. The vice inheres, not in the collection concept, but in the failure to make provision for those without the means to comply with child-support obligations. I draw support from Mr. Justice Harlan's opinion in *Boddie* v. *Connecticut*. In that case, the Court struck down filing fees for divorce actions as applied to those wholly unable to pay, holding "that a State may not, consistent with the obligations

imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U. S., at 383. The monopolization present in this case is total, for Wisconsin will not recognize foreign marriages that fail to conform to the requirements of § 245.10.[2]

The third justification, only obliquely advanced by appellant, is that the statute preserves the ability of marriage

[2] *Boddie* was an "as applied" challenge; it does not require invalidation of § 245.10 as unconstitutional on its face. In ordinary circumstances, the Court should merely require that Wisconsin permit those members of the appellee class to marry if they can demonstrate "the *bona fides* of [their] indigency," 401 U. S., at 382. The statute in question, however, does not contain a severability clause, and the Wisconsin Legislature has made specific provision for the contingency that "utilization of the procedures [under § 245.10 may be] stayed or enjoined by the order of any court." In the event of such a stay or injunction after February 1, 1978, 1977 Wis. Laws, ch. 105, § 3 (Wis. Stat. § 245.105 (3)), Wis. Legis. Serv. (West 1977), provides that "permission to remarry may likewise be granted to any petitioner who submits clear and convincing proof to the court that for reasonable cause he or she was not able to comply with a previous court obligation for child support."

The dissenting opinion of MR. JUSTICE REHNQUIST suggests that appellee may no longer be "incapable of discharging the arrearage as required by the support order and contributing sufficient funds in the future to remove his child from the welfare rolls." *Post*, at 410. There is no basis in the record for such speculation. The parties entered into a stipulation that as of August 1974, a month before appellee was denied a marriage license, appellee "was unemployed and indigent and unable to pay any sum for support of his issue." App. 21. In its opinion dated August 31, 1976, the District Court noted that "[i]n Redhail's case, because of his poverty he has been unable to satisfy the support obligation ordered in the paternity action, and, hence, a state court could not grant him permission to marry." 418 F. Supp. 1061, 1070 (ED Wis.). Appellant has not challenged the factual predicate of the trial court's determination, or even intimated that appellee's financial situation has improved materially. Such matters, of course, may be inquired into by the local court pursuant to the new procedures that will go into effect after February 1, 1978.

applicants to support their prior issue by preventing them from incurring new obligations. The challenged provisions of § 245.10 are so grossly underinclusive with respect to this objective, given the many ways that additional financial obligations may be incurred by the applicant quite apart from a contemplated marriage, that the classification "does not bear a fair and substantial relation to the object of the legislation." *Craig* v. *Boren*, *supra*, at 211 (POWELL, J., concurring). See *Eisenstadt* v. *Baird*, 405 U. S. 438, 447–450 (1972); cf. *Moore* v. *East Cleveland*, 431 U. S., at 499–500 (plurality opinion).

The marriage applicant is required by the Wisconsin statute not only to submit proof of compliance with his support obligation, but also to demonstrate—in some unspecified way—that his children "are not then and are not likely thereafter to become public charges." [3] This statute does more than simply "fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." *Griffin* v. *Illinois*, 351 U. S. 12, 34 (1956) (Harlan, J., dissenting). It tells the truly indigent, whether they have met their support obligations or not, that they may not marry so long as their children are public charges or there is a danger that their children might go on public assistance in the future.[4] Apparently, no other jurisdiction has embraced this approach as a method of reducing the number of children on public assistance. Because the State has not established a justification for

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[3] The plaintiff in the companion case, *Leipzig* v. *Pallamolla*, 418 F. Supp. 1073 (ED Wis. 1976), had complied with his support obligations but was denied permission to marry because his four minor children received welfare benefits.

[4] Quite apart from any impact on the truly indigent, the statute appears to "confer upon [the judge] a license for arbitrary procedure," *Kent* v. *United States*, 383 U. S. 541, 553 (1966), in the determination of whether an applicant's children are "likely thereafter to become public charges." A serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction in this area.

this unprecedented foreclosure of marriage to many of its citizens solely because of their indigency, I concur in the judgment of the Court.

MR. JUSTICE STEVENS, concurring in the judgment.

Because of the tension between some of the language in MR. JUSTICE MARSHALL'S opinion for the Court and the Court's unanimous holding in *Califano* v. *Jobst*, *ante*, p. 47, a further exposition of the reasons why the Wisconsin statute offends the Equal Protection Clause of the Fourteenth Amendment is necessary.

When a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently. Classification based on marital status has been an accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations. As cases like *Jobst* demonstrate, such laws may "significantly interfere with decisions to enter into the marital relationship." *Ante*, at 386. That kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences between married persons as a class and unmarried persons as a class.[1]

A classification based on marital status is fundamentally

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[1] In *Jobst*, we pointed out that "it was rational for Congress to assume that marital status is a relevant test of probable dependency . . . ." We had explained:

"Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried." *Ante*, at 53.

different from a classification which determines who may lawfully enter into the marriage relationship.[2] The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection. See *Whalen* v. *Roe*, 429 U. S. 589, 599–600. It is not, however, an interest which is constitutionally immune from evenhanded regulation. Thus, laws prohibiting marriage to a child, a close relative, or a person afflicted with venereal disease, are unchallenged even though they "interfere directly and substantially with the right to marry." *Ante*, at 387. This Wisconsin statute has a different character.

Under this statute, a person's economic status may determine his eligibility to enter into a lawful marriage. A noncustodial parent whose children are "public charges" may not marry even if he has met his court-ordered obligations.[3] Thus, within the class of parents who have fulfilled their court-ordered obligations, the rich may marry and the poor may not. This type of statutory discrimination is, I believe, totally unprecedented,[4] as well as inconsistent with our tradition of administering justice equally to the rich and to the poor.[5]

The statute appears to reflect a legislative judgment that persons who have demonstrated an inability to support their offspring should not be permitted to marry and thereafter to

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[2] *Jobst* is in the former category; *Loving* v. *Virginia*, 388 U. S. 1, is in the latter.

[3] As MR. JUSTICE POWELL demonstrates, a constitutional defect in this provision invalidates the entire statute. *Ante*, at 401 n. 2.

[4] The economic aspects of a prospective marriage are unquestionably relevant to almost every individual's marriage decision. But I know of no other state statute that denies the individual marriage partners the right to assess the financial consequences of their decision independently. I seriously question whether any limitation on the right to marry may be predicated on economic status, but that question need not be answered in this case.

[5] This tradition explains why each member of the federal judiciary has sworn or affirmed that he will "do equal right to the poor and to the rich . . . ." See 28 U. S. C. § 453.

bring additional children into the world.[6] Even putting to one side the growing number of childless marriages and the burgeoning number of children born out of wedlock, that sort of reasoning cannot justify this deliberate discrimination against the poor.

The statute prevents impoverished parents from marrying even though their intended spouses are economically independent. Presumably, the Wisconsin Legislature assumed (a) that only fathers would be affected by the legislation, and (b) that they would never marry employed women. The first assumption ignores the fact that fathers are sometimes awarded custody,[7] and the second ignores the composition of today's work force.[8] To the extent that the statute denies a hard-pressed parent any opportunity to prove that an intended marriage will ease rather than aggravate his financial straits, it not only rests on unreliable premises, but also defeats its own objectives.

These questionable assumptions also explain why this statutory blunderbuss is wide of the target in another respect. The prohibition on marriage applies to the noncustodial parent but allows the parent who has custody to marry without the State's leave. Yet the danger that new children will further strain

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[6] The "public charge" provision, which falls on parents who have faithfully met their obligations, but who are unable to pay enough to remove their children from the welfare rolls, obviously cannot be justified by a state interest in assuring the payment of child support. And, of course, it would be absurd for the State to contend that an interest in providing paternalistic counseling supports a total ban on marriage.

[7] The Wisconsin Legislature has itself provided:

"In determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent." Wis. Stat. § 247.24 (3) (1977).

[8] Plainly, both of these assumptions are the product of a habitual way of thinking about male and female roles "rather than analysis or actual reflection." See *Califano* v. *Goldfarb*, 430 U. S. 199, 222 (STEVENS, J., concurring in judgment).

an inadequate budget is equally great for custodial and noncustodial parents, unless one assumes (a) that only mothers will ever have custody and (b) that they will never marry unemployed men.

Characteristically, this law fails to regulate the marriages of those parents who are least likely to be able to afford another family, for it applies only to parents under a court order to support their children. Wis. Stat. § 245.10 (1) (1973). The very poorest parents are unlikely to be the objects of support orders.[9] If the State meant to prevent the marriage of those who have demonstrated their inability to provide for children, it overlooked the most obvious targets of legislative concern.

In sum, the public-charge provision is either futile or perverse insofar as it applies to childless couples, couples who will have illegitimate children if they are forbidden to marry, couples whose economic status will be improved by marriage, and couples who are so poor that the marriage will have no impact on the welfare status of their children in any event. Even assuming that the right to marry may sometimes be denied on economic grounds, this clumsy and deliberate legislative discrimination between the rich and the poor is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[10]

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[9] Although Wisconsin precedents are scarce, the State's courts seem to follow the general rule that child-support orders are heavily influenced by the parent's ability to pay. See H. Clark, Law of Domestic Relations 496 (1968); see also *Miller* v. *Miller*, 67 Wis. 2d 435, 227 N. W. 2d 626 (1975). A parent who is so disabled that he will never earn enough to pay child support is unlikely to be sued, and a court order is unlikely to be granted. Cf. *Ponath* v. *Hedrick*, 22 Wis. 2d 382, 126 N. W. 2d 28 (1964) (social security benefits not to be included in determining relative's ability to make support payments).

[10] Neither the fact that the appellee's interest is constitutionally protected, nor the fact that the classification is based on economic status is sufficient to justify a "level of scrutiny" so strict that a holding of unconstitutionality is virtually foreordained. On the other hand, the presence of these factors precludes a holding that a rational expectation of occasional and random

MR. JUSTICE REHNQUIST, dissenting.

I substantially agree with my Brother POWELL's reasons for rejecting the Court's conclusion that marriage is the sort of "fundamental right" which must invariably trigger the strictest judicial scrutiny. I disagree with his imposition of an "intermediate" standard of review, which leads him to conclude that the statute, though generally valid as an "additional collection mechanism" offends the Constitution by its "failure to make provision for those without the means to comply with child-support obligations." *Ante,* at 400. For similar reasons, I disagree with my Brother STEWART's conclusion that the statute is invalid for its failure to exempt those persons who "simply cannot afford to meet the statute's financial requirements." *Ante,* at 394. I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the Equal Protection Clause the statute need pass only the "rational basis test," *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970), and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective, *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 491 (1955); *Ferguson* v. *Skrupa,* 372 U. S. 726, 733 (1963) (Harlan, J., concurring). The statute so viewed is a permissible exercise of the State's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the concurring opinions.

Earlier this Term the traditional standard of review was applied in *Califano* v. *Jobst, ante,* p. 47, despite the claim that the statute there in question burdened the exercise of the right to marry. The extreme situation considered there involved a permanently disabled appellee whose benefits under the Social Security Act had been terminated because of his

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benefit is sufficient to demonstrate compliance with the constitutional command to govern impartially. See *Craig* v. *Boren,* 429 U. S. 190, 211 (STEVENS, J., concurring).

marriage to an equally disabled woman who was not, however, a beneficiary under the Act. This Court recognized that Congress, in granting the original benefit, could reasonably assume that a disabled adult child remained dependent upon his parents for support. The Court concluded that, upon a beneficiary's marriage, Congress could terminate his benefits, because "there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried." *Ante*, at 53. Although that assumption had been proved false as applied in that individual case, the statute was nevertheless rational. "The broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Ante*, at 55.

The analysis applied in *Jobst* is equally applicable here. Here, too, the Wisconsin Legislature has "adopted this rule in the course of constructing a complex social welfare system that necessarily deals with the intimacies of family life." *Ante*, at 54 n. 11. Because of the limited amount of funds available for the support of needy children, the State has an exceptionally strong interest in securing as much support as their parents are able to pay. Nor does the extent of the burden imposed by this statute so differentiate it from that considered in *Jobst* as to warrant a different result. In the case of some applicants, this statute makes the proposed marriage legally impossible for financial reasons; in a similar number of extreme cases, the Social Security Act makes the proposed marriage practically impossible for the same reasons. I cannot conclude that such a difference justifies the application of a heightened standard of review to the statute in question here. In short, I conclude that the statute, despite its imperfections, is sufficiently rational to satisfy the demands of the Fourteenth Amendment.

Two of the opinions concurring in the judgment seem to agree that the statute is sufficiently rational except as applied to the truly indigent. *Ante*, at 394 (STEWART, J.); *ante*, at

400 (POWELL, J.). Under this view, the statute could, I suppose, be constitutionally applied to forbid the marriages of those applicants who had willfully failed to contribute so much as was in their means to the support of their dependent children. Even were I to agree that a statute based upon generally valid assumptions could be struck down on the basis of "selected, atypical examples," *Jobst, ante,* at 55, I could not concur in the judgment of the Court, because there has been no showing that this appellee is so truly indigent that the State could not refuse to sanction his marriage.

Under well-established rules of standing, a litigant may assert the invalidity of a statute only as applied in his case. "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court." *Broadrick* v. *Oklahoma,* 413 U. S. 601, 610 (1973). See also *Barrows* v. *Jackson,* 346 U. S. 249, 256–257 (1953). We have made a limited exception to this rule in cases arising under the First Amendment, allowing the invalidation of facially overbroad statutes to guard against a chilling effect on the exercise of constitutionally protected free speech. See, *e. g., Coates* v. *Cincinnati,* 402 U. S. 611 (1971). But no claim based on the First Amendment is or could be made by this appellee.

Appellee's standing to contest the validity of the statute as applied to him must be considered on the basis of the facts as stipulated before the District Court. The State conceded, without requiring proof, that "[f]rom May of 1972 until August of 1974, [appellee] was unemployed and indigent and unable to pay any sum for support of his issue." App. 21. There is no stipulation in this record that appellee was indigent at the time he was denied a marriage license on September 30, 1974, or that he was indigent at the time he filed his complaint on December 24, 1974, or that he was indigent at the time the District Court rendered its judgment on August 31, 1976. All we know of his more recent financial

condition is his counsel's concession at oral argument that appellee had married in Illinois, Tr. of Oral Arg. 23, clearly demonstrating that he knows how to obtain funds for a purpose which he deems sufficiently important. On these inartfully stipulated facts, it cannot be said, even now, that this appellee is incapable of discharging the arrearage as required by the support order and contributing sufficient funds in the future to remove his child from the welfare rolls. Therefore, even under the view taken by the opinions concurring in the judgment, appellee has not shown that this statute is unconstitutional as applied to him.

Because of my conclusion that the statute is valid despite its possible application to the truly indigent, I need not determine whether the named appellee's failure to establish his indigency should preclude this Court from granting injunctive relief to the indigent members of the class which appellee purports to represent.* Our decisions have demonstrated that, where the claim of the named representative has become moot, this Court is not bound to dismiss the action but may consider a variety of factors in determining whether to proceed. See generally *Kremens* v. *Bartley*, 431 U. S. 119, 129–135 (1977). It has never been explicitly determined whether

*Ordinarily, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 403 (1977), quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 216 (1974). At least where the issue is properly raised, an appellate court may consider the representative's failure to establish his own claim in determining whether a class action may be maintained. See, *e. g.*, *Donaldson* v. *Pillsbury Co.*, 554 F. 2d 825, 831–832, n. 5 (CA8 1977); cf. *East Texas*, *supra*, at 406 n. 12. In some instances, the court may eliminate from the class those persons whom the named plaintiff may not adequately represent. *La Mar* v. *H & B Novelty & Loan Co.*, 489 F. 2d 461 (CA9 1973). In this case, such an approach could require the dismissal of the class action altogether, since appellee can represent no one with a valid claim. The State, however, has inexplicably failed to challenge the certification of the plaintiff class, either here or in the trial court.

similar considerations apply where the named representative never had a valid claim of his own. But see *Allee* v. *Medrano*, 416 U. S. 802, 828–829, and n. 4 (1974) (BURGER, C. J., concurring and dissenting). In light of my view on the merits, I am content to save this question for another day.

I would reverse the judgment of the District Court.

CHRISTIANSBURG GARMENT CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1383. Argued November 28-29, 1977—Decided January 23, 1978

Two years after a racial discrimination charge under Title VII of the Civil Rights Act of 1964 had been filed against petitioner company, respondent, the Equal Employment Opportunity Commission (EEOC), notified the complainant that its conciliation efforts had failed and that she had the right to sue the company, which she did not do. Almost two years later, § 14 of the 1972 amendments to Title VII authorized the EEOC to sue in its own name on charges "pending" with the EEOC on the effective date of the amendments. The EEOC then sued petitioner on complainant's charge and the District Court granted petitioner's motion for summary judgment on the ground that the charge had not been "pending" at the time of the 1972 amendments. The company then petitioned for the allowance of attorney's fees against the EEOC pursuant to § 706 (k) of Title VII, which authorizes a district court in its discretion to allow the prevailing party a reasonable attorney's fee. Finding that the EEOC's action in bringing the suit was not "unreasonable or meritless" and that its statutory interpretation of § 14 was not "frivolous," the District Court ruled that an award to petitioner of attorney's fees was not justified. The Court of Appeals affirmed. *Held:*

1. Although a prevailing *plaintiff* in a Title VII proceeding is ordinarily to be awarded attorney's fees by the district court in all but special circumstances, a prevailing *defendant* is to be awarded such fees only when the court in the exercise of its discretion has found that the plaintiff's action was frivolous, unreasonable, or without foundation. Pp. 415-422.

(a) There are at least two strong equitable considerations favoring an attorney's fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a Title VII defendant, *viz.*, the plaintiff is Congress' chosen instrument to vindicate "a policy that Congress considered of the highest priority," *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 402, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. Pp. 418-419.

(b) No statutory provision would have been necessary had an award of attorney's fees to a prevailing defendant been based only on the plaintiff's bad faith in bringing the action, for even under the American common-law rule (which ordinarily does not allow attorney's fees to the prevailing party) such fees can be awarded against a party who has proceeded in bad faith. P. 419.

2. The District Court properly applied the foregoing standards and did not abuse its discretion in concluding that an award to petitioner of attorney's fees was not justified. Pp. 423–424.

550 F. 2d 949, affirmed.

STEWART, J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN, J., who took no part in the consideration or decision of the case.

William W. Sturges argued the cause for petitioner. With him on the brief was *William B. Poff.*

Thomas S. Martin argued the cause for respondent. With him on the brief were *Solicitor General McCree, Deputy Solicitor General Wallace, Abner W. Sibal, Joseph T. Eddins,* and *Beatrice Rosenberg.**

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 706 (k) of Title VII of the Civil Rights Act of 1964 provides:

"In any action or proceeding under this title the court,

**Robert J. Hickey, G. Brockwel Heylin, Stephen A. Bokat, Stanley T. Kaleczyc, Jr.,* and *Lawrence B. Kraus* filed a brief for the National Chamber Litigation Center as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Charles A. Bane, Thomas D. Barr, Armand Derfner, Norman Redlich, Robert A. Murphy, Richard T. Seymour,* and *William E. Caldwell* for the Lawyers' Committee for Civil Rights under Law; and by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Melvyn R. Leventhal,* and *Eric Schnapper* for the NAACP Legal Defense & Educational Fund, Inc.

Robert E. Williams, Douglas S. McDowell, and *Kenneth C. McGuiness* filed a brief for the Equal Employment Advisory Council as *amicus curiae.*

in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." [1]

The question in this case is under what circumstances an attorney's fee should be allowed when the defendant is the prevailing party in a Title VII action—a question about which the federal courts have expressed divergent views.

I

Two years after Rosa Helm had filed a Title VII charge of racial discrimination against the petitioner Christiansburg Garment Co. (company), the Equal Employment Opportunity Commission notified her that its conciliation efforts had failed and that she had the right to sue the company in federal court. She did not do so. Almost two years later, in 1972, Congress enacted amendments to Title VII.[2] Section 14 of these amendments authorized the Commission to sue in its own name to prosecute "charges pending with the Commission" on the effective date of the amendments. Proceeding under this section, the Commission sued the company, alleging that it had engaged in unlawful employment practices in violation of the amended Act. The company moved for summary judgment on the ground, *inter alia,* that the Rosa Helm charge had not been "pending" before the Commission when the 1972 amendments took effect. The District Court agreed, and granted summary judgment in favor of the company. 376 F. Supp. 1067 (WD Va).[3]

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[1] Section 706 (k) provides in full: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." 78 Stat. 261, 42 U. S. C. § 2000e–5 (k).

[2] Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103.

[3] The Commission argued that charges as to which no private suit had been brought as of the effective date of the amendments remained "pend-

The company then petitioned for the allowance of attorney's fees against the Commission pursuant to § 706 (k) of Title VII. Finding that "the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless," the District Court concluded that "an award of attorney's fees to petitioner is not justified in this case." [4] A divided Court of Appeals affirmed, 550 F. 2d 949 (CA4), and we granted certiorari to consider an important question of federal law, 432 U. S. 905.

II

It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240. Congress has provided only limited exceptions to this rule "under selected statutes granting or protecting various federal rights." *Id.*, at 260. Some of these statutes make fee awards mandatory for prevailing plaintiffs; [5] others make awards permissive but limit them to certain parties,

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ing" before the Commission so long as the complaint had not been dismissed and the dispute had not been resolved through conciliation. The Commission supported its construction of § 14 with references to the legislative history of the 1972 amendments.

The District Court concluded that when Rosa Helm was notified in 1970 that conciliation had failed and that she had a right to sue the company, the Commission had no further action legally open to it, and its authority over the case terminated on that date. Section 14's reference to "pending" cases was held "to be limited to charges still in the process of negotiation and conciliation" on the effective date of the 1972 amendments. 376 F. Supp., at 1074.

The District Court rejected on the merits two additional grounds advanced by the company in support of its motion for summary judgment.

[4] The opinion of the District Court dealing with the motion for attorney's fees is reported at 12 FEP Cases 533.

[5] See, *e. g.*, Clayton Act, 38 Stat. 731, 15 U. S. C. § 15; Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U. S. C. § 216 (b); Packers and Stockyards Act, 42 Stat. 165, 7 U. S. C. § 210 (f); Truth in Lending Act, 82 Stat. 157, 15 U. S. C. § 1640 (a); and Merchant Marine Act, 1936, 49 Stat. 2015, 46 U. S. C. § 1227.

usually prevailing plaintiffs.[6] But many of the statutes are more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants, and entrusting the effectuation of the statutory policy to the discretion of the district courts.[7] Section 706 (k) of Title VII of the Civil Rights Act of 1964 falls into this last category, providing as it does that a district court may in its discretion allow an attorney's fee to the prevailing party.

In *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, the Court considered a substantially identical statute authorizing the award of attorney's fees under Title II of the Civil Rights Act of 1964.[8] In that case the plaintiffs had prevailed, and the Court of Appeals had held that they should be awarded their attorney's fees "only to the extent that the respondents' defenses had been advanced 'for purposes of delay and not in good faith.'" *Id.*, at 401. We ruled that this "subjective standard" did not properly effectuate the purposes of the counsel-fee provision of Title II. Relying primarily on the intent of Congress to cast a Title II plaintiff in the role of "a 'private attorney general,' vindicating a policy that Congress considered of the highest priority," we held that a prevailing plaintiff under Title II "should ordinarily recover an attorney's fee unless special circumstances would render such an award

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[6] See, *e. g.*, Privacy Act of 1974, 88 Stat. 1897, 5 U. S. C. § 552a (g) (2)(B) (1976 ed.); Fair Housing Act of 1968, 82 Stat. 88, 42 U. S. C. § 3612 (c).

[7] See, *e. g.*, Trust Indenture Act of 1939, 53 Stat. 1171, 15 U. S. C. § 77*ooo* (e); Securities Exchange Act of 1934, 48 Stat. 889, 897, 15 U. S. C. §§ 78i (e), 78r (a); Federal Water Pollution Control Act, 86 Stat. 889, 33 U. S. C. § 1365 (d) (1970 ed., Supp. V); Clean Air Act, 84 Stat. 1706, 42 U. S. C. § 1857h–2 (d); Noise Control Act of 1972, 86 Stat. 1244, 42 U. S. C. § 4911 (d) (1970 ed., Supp. V).

[8] "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 42 U. S. C. § 2000a–3 (b).

unjust." *Id.*, at 402. We noted in passing that if the objective of Congress had been to permit the award of attorney's fees only against defendants who had acted in bad faith, "no new statutory provision would have been necessary," since even the American common-law rule allows the award of attorney's fees in those exceptional circumstances. *Id.*, at 402 n. 4.[9]

In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, the Court made clear that the *Piggie Park* standard of awarding attorney's fees to a successful plaintiff is equally applicable in an action under Title VII of the Civil Rights Act. 422 U. S., at 415. See also *Northcross* v. *Memphis Board of Education*, 412 U. S. 427, 428. It can thus be taken as established, as the parties in this case both acknowledge, that under § 706 (k) of Title VII a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances.[10]

III

The question in the case before us is what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful *defendant* in a Title VII action. Not surprisingly, the parties in addressing the question in their briefs and oral arguments have taken almost diametrically opposite positions.[11]

The company contends that the *Piggie Park* criterion for a successful plaintiff should apply equally as a guide to the

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[9] The propriety under the American common-law rule of awarding attorney's fees against a losing party who has acted in bad faith was expressly reaffirmed in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 258–259.

[10] *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1045 (CA4) (finding "special circumstances" justifying no award to prevailing plaintiff); *Carrion* v. *Yeshiva Univ.*, 535 F. 2d 722, 727 (CA2); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 716 (CA5); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 429–430 (CA8).

[11] Briefs by *amici* have also been filed in support of each party.

award of attorney's fees to a successful defendant. Its submission, in short, is that every prevailing defendant in a Title VII action should receive an allowance of attorney's fees "unless special circumstances would render such an award unjust." [12] The respondent Commission, by contrast, argues that the prevailing defendant should receive an award of attorney's fees only when it is found that the plaintiff's action was brought in bad faith. We have concluded that neither of these positions is correct.

A

Relying on what it terms "the plain meaning of the statute," the company argues that the language of § 706 (k) admits of only one interpretation: "A prevailing defendant is entitled to an award of attorney's fees on the same basis as a prevailing plaintiff." But the permissive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction. The terms of § 706 (k) provide no indication whatever of the circumstances under which either a plaintiff *or* a defendant should be entitled to attorney's fees. And a moment's reflection reveals that there are at least two strong equitable considerations counseling an attorney's fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant.

First, as emphasized so forcefully in *Piggie Park*, the plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority." 390 U. S., at 402. Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. As the Court of Appeals clearly perceived, "these policy considerations which support the award of fees to a

[12] This was the view taken by Judge Widener, dissenting in the Court of Appeals, 550 F. 2d 949, 952 (CA4). At least two other federal courts have expressed the same view. *EEOC* v. *Bailey Co.*, 563 F. 2d 439, 456 (CA6); *United States* v. *Allegheny-Ludlum Industries*, 558 F. 2d 742, 744 (CA5).

prevailing plaintiff are not present in the case of a prevailing defendant." 550 F. 2d, at 951. A successful defendant seeking counsel fees under § 706 (k) must rely on quite different equitable considerations.

But if the company's position is untenable, the Commission's argument also misses the mark. It seems clear, in short, that in enacting § 706 (k) Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action. As pointed out in *Piggie Park,* if that had been the intent of Congress, no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith.[13]

Furthermore, while it was certainly the policy of Congress that Title VII plaintiffs should vindicate "a policy that Congress considered of the highest priority," *Piggie Park,* 390 U. S., at 402, it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary judicial process, *Occidental Life Ins. Co.* v. *EEOC,* 432 U. S. 355. A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting § 706 (k), Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith.

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[13] See n. 9, *supra.* Had Congress provided for attorney's fee awards only to successful plaintiffs, an argument could have been made that the congressional action had pre-empted the common-law rule, and that, therefore, a successful defendant could not recover attorney's fees even against a plaintiff who had proceeded in bad faith. Cf. *Byram Concretanks, Inc.* v. *Warren Concrete Products Co. of New Jersey,* 374 F. 2d 649, 651 (CA3). But there is no indication whatever that the purpose of Congress in enacting § 706 (k) in the form that it did was simply to foreclose such an argument.

B

The sparse legislative history of § 706 (k) reveals little more than the barest outlines of a proper accommodation of the competing considerations we have discussed. The only specific reference to § 706 (k) in the legislative debates indicates that the fee provision was included to "make it easier for a plaintiff of limited means to bring a meritorious suit." [14] During the Senate floor discussions of the almost identical attorney's fee provision of Title II, however, several Senators explained that its allowance of awards to defendants would serve "to deter the bringing of lawsuits without foundation," [15] "to discourage frivolous suits," [16] and "to diminish the likelihood of unjustified suits being brought." [17] If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis. The Court of Appeals for the District of Columbia Circuit seems to have drawn the maximum significance from the Senate debates when it concluded:

> "[From these debates] two purposes for § 706 (k) emerge. First, Congress desired to 'make it easier for a plaintiff of limited means to bring a meritorious suit' . . . . But second, and equally important, Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party'—be it plaintiff or defendant—could obtain legal fees." *Grubbs* v. *Butz*, 179 U. S. App. D. C. 18, 20, 548 F. 2d 973, 975.

The first federal appellate court to consider what criteria should govern the award of attorney's fees to a prevailing

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[14] Remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964).

[15] Remarks of Senator Lausche, *id.*, at 13668.

[16] Remarks of Senator Pastore, *id.*, at 14214.

[17] Remarks of Senator Humphrey, *id.*, at 6534.

Title VII defendant was the Court of Appeals for the Third Circuit in *United States Steel Corp.* v. *United States,* 519 F. 2d 359. There a District Court had denied a fee award to a defendant that had successfully resisted a Commission demand for documents, the court finding that the Commission's action had not been " 'unfounded, meritless, frivolous or vexatiously brought.' " *Id.,* at 363. The Court of Appeals concluded that the District Court had not abused its discretion in denying the award. *Id.,* at 365. A similar standard was adopted by the Court of Appeals for the Second Circuit in *Carrion* v. *Yeshiva University,* 535 F. 2d 722. In upholding an attorney's fee award to a successful defendant, that court stated that such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Id.,* at 727.[18]

To the extent that abstract words can deal with concrete cases, we think that the concept embodied in the language adopted by these two Courts of Appeals is correct. We would qualify their words only by pointing out that the term "meritless" is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and that the term "vexatious" in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him. In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post*

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[18] At least three other Circuits are in general agreement. See *Bolton* v. *Murray Envelope Corp.,* 553 F. 2d 881, 884 n. 2 (CA5); *Grubbs* v. *Butz,* 179 U. S. App. D. C. 18, 20–21, 548 F. 2d 973, 975–976; *Wright* v. *Stone Container Corp.,* 524 F. 2d 1058, 1063–1064 (CA8).

hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

That § 706 (k) allows fee awards only to *prevailing* private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success.[19] To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.[20]

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[19] See remarks of Senator Miller, 110 Cong. Rec. 14214 (1964), with reference to the parallel attorney's fee provision in Title II.

[20] Initially, the Commission argued that the "costs" assessable against the Government under § 706 (k) did not include attorney's fees. See, *e. g.*, *United States Steel Corp.* v. *United States*, 519 F. 2d 359, 362 (CA3); *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131, 1132–1133 (CA9). But the Courts of Appeals rejected this position and, during the

IV

In denying attorney's fees to the company in this case, the District Court focused on the standards we have discussed. The court found that "the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless" because "the basis upon which petitioner prevailed was an

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course of appealing this case, the Commission abandoned its contention that it was legally immune to adverse fee awards under § 706 (k). 550 F. 2d, at 951.

It has been urged that fee awards against the Commission should rest on a standard different from that governing fee awards against private plaintiffs. One *amicus* stresses that the Commission, unlike private litigants, needs no inducement to enforce Title VII since it is required by statute to do so. But this distinction between the Commission and private plaintiffs merely explains why Congress drafted § 706 (k) to preclude the recovery of attorney's fees by the Commission; it does not support a difference in treatment among private and Government plaintiffs when a prevailing defendant seeks to recover his attorney's fees. Several courts and commentators have also deemed significant the Government's greater ability to pay adverse fee awards compared to a private litigant. See, *e. g., United States Steel Corp.* v. *United States, supra,* at 364 n. 24; Heinsz, Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard, 8 U. Toledo L. Rev. 259, 290 (1977); Comment, Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants, 1976 Wis. L. Rev. 207, 228. We are informed, however, that such awards must be paid from the Commission's litigation budget, so that every attorney's fee assessment against the Commission will inevitably divert resources from the agency's enforcement of Title VII. See 46 Comp. Gen. 98, 100 (1966); 38 Comp. Gen. 343, 344–345 (1958). The other side of this coin is the fact that many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights. In short, there are equitable considerations on both sides of this question. Yet § 706 (k) explicitly provides that "the Commission and the United States shall be liable for costs the same as a private person." Hence, although a district court may consider distinctions between the Commission and private plaintiffs in determining the reasonableness of the Commission's litigation efforts, we find no grounds for applying a different general standard whenever the Commission is the losing plaintiff.

issue of first impression requiring judicial resolution" and because the "Commission's statutory interpretation of § 14 of the 1972 amendments was not frivolous." The court thus exercised its discretion squarely within the permissible bounds of § 706 (k). Accordingly, the judgment of the Court of Appeals upholding the decision of the District Court is affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

VENDO CO. *v.* LEKTRO-VEND CORP. ET AL.

ON MOTION FOR CLARIFICATION OF JUDGMENT

No. 76–156. Decided January 23, 1978

Petitioner's motion for clarification of this Court's judgment ordering that "this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court," is denied. While such motion may be properly treated as a motion for leave to file a petition for a writ of mandamus against the District Court (to which the Court of Appeals in turn had remanded the case) to execute this Court's judgment, it does not appear that service of the motion was made on the judge or judges to whom the writ is sought to be directed as required by this Court's Rule 31, and, in any event, to grant the motion for clarification would serve no useful purpose since the judgment in question is typically a routine order directing that this Court's decision be carried into effect. If petitioner believes the District Court is failing to carry out the judgment of this Court, its remedy is by motion for leave to file a writ of mandamus pursuant to Rule 31.

PER CURIAM.

Petitioner has filed a motion "for clarification of mandate" in this case, and respondents have filed a memorandum in answer to petitioner's motion.* We decided this case last Term on June 29, 1977, 433 U. S. 623; MR. JUSTICE REHNQUIST delivered a plurality opinion for himself, MR. JUSTICE STEWART, and MR. JUSTICE POWELL; and MR. JUSTICE BLACKMUN delivered an opinion concurring in the result for himself and THE CHIEF JUSTICE. While these opinions did not agree in their reasoning, each of them concluded that the judgment of the

*Petitioner entitles its present motion a "Motion of Petitioner for Clarification of Mandate." Unless the Court specifically directs to the contrary, however, formal mandates do not issue in cases coming from federal courts. See this Court's Rule 59. No formal mandate was issued in this case. Accordingly, we read petitioner's motion as a motion for clarification of judgment.

Court of Appeals for the Seventh Circuit, which had in turn affirmed the issuance of an injunction by the District Court for the Northern District of Illinois, should be reversed. MR. JUSTICE STEVENS, delivered a dissenting opinion for himself, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL. The dissenting Members of the Court would have affirmed the Court of Appeals for the Seventh Circuit. The judgment of the Court, using language customary in such documents, ordered "that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court." On August 19, 1977, the Court of Appeals in turn entered an order remanding the case to the District Court "for further proceedings, in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977."

A timely petition for rehearing was filed in this Court, contending, *inter alia:*

> "The Concurring Opinion . . . was explicitly based on the false assumption that 'only one state-court proceeding was involved in this case.' The Concurring Opinion states that 'the District Court failed properly to apply the *California Motor Transport* rule' because
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> " 'The court believed that it was enough that Vendo's activities in the *single state-court proceeding involved in this case* were not genuine attempts to use the state adjudicative process legitimately' [433 U. S., at 645].
>
> "That interpretation of the District Court's findings is erroneous."

This petition for rehearing was denied on October 3, 1977. *Post,* p. 881.

Meanwhile, respondents took the position in the District Court that the injunction which it had issued continued to be binding in spite of this Court's decision, and petitioner therefore filed a motion in the District Court asking that the pre-

liminary injunction previously issued be formally dissolved. The District Court has thus far declined to dissolve the injunction, and petitioner asserts that it has expressed the view that the preliminary injunction is still in effect until dissolved by that court, and any action by petitioner to collect its state-court judgments would risk contempt.

Respondents' memorandum in answer to petitioner's motion for clarification of judgment states, correctly we believe, that "[i]n effect, Vendo's Motion for Clarification is a petition for this Court to mandamus the District Court to grant Vendo's Motion to Dissolve." Respondents contend that the District Court was not required by the opinions and judgment of this Court to dissolve the preliminary injunction which it had earlier issued, but that the District Court should be permitted to decide Vendo's motion to dissolve before Vendo can appeal.

Respondents' memorandum in this Court sets forth their contentions made to the District Court after remand as to why the injunction should not be dissolved. These contentions are: (1) further findings of fact which are warranted by the record should be made in support of the injunction; (2) a finding of grave abuse of the state courts by Vendo, in seeking to further the precise conduct prescribed by the antitrust laws, is fully warranted by the record and should be made in support of the injunction; (3) the District Court should permit the record to be supplemented by further evidence newly discovered since the prior hearing; (4) the District Court should grant respondents the protection offered by Vendo's so-called consent decrees and by the representations to this Court made by Vendo in opposing a stay.

We believe that the parties are correct in treating this as an action for mandamus, which is available to a party who has prevailed in this Court if the lower court "does not proceed to execute the mandate, or disobeys and mistakes its meaning . . . ." *United States* v. *Fossatt*, 21 How. 445, 446 (1859). Put another way, "[w]hen a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever

was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. . . . If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court." *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255 (1895).

While the parties both treat petitioner's motion for clarification as a motion for leave to file a petition for a writ of mandamus, and are, we believe, correct in so doing, this Court's Rule 31 requires that the motion and petition "shall be served on the judge or judges to whom the writ is sought to be directed . . . ." There is no indication in the papers filed by either petitioner or respondents that any such service has been made. The granting of petitioner's motion for clarification of judgment would serve no useful purpose, since the judgment is typically a routine order directing that the decision of this Court be carried into effect. If petitioner is of the view that the District Court to which the case was remanded is failing to carry out the judgment of this Court, its remedy is by motion for leave to file a writ mandamus pursuant to Rule 31, including service of the motion or petition upon the judge or judges to whom the writ would be directed. The petition for clarification of judgment is therefore denied, without prejudice to the filing of a motion for leave to file a petition for mandamus.

It is so ordered.

Syllabus

RAYMOND MOTOR TRANSPORTATION, INC., ET AL. *v.* RICE, SECRETARY, DEPARTMENT OF TRANSPORTATION OF WISCONSIN, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

No. 76–558. Argued November 8–9, 1977—Decided February 21, 1978

Wisconsin statutes, as a general rule, do not allow trucks longer than 55 feet or pulling more than one other vehicle to be operated on highways within that State without a permit. Implementing regulations set forth the conditions under which "trailer train" and other classes of permits will be issued, and contain a great number of exceptions to the general rule. Appellant motor carriers were denied permits to operate 65-foot double-trailer units on certain interstate highways in Wisconsin on the ground that their proposed operations were not within the narrow scope of the regulations specifying when "trailer train" permits will be issued. Appellants then filed suit in Federal District Court seeking declaratory and injunctive relief on the ground that the regulations barring their operation of 65-foot doubles burdened and discriminated against interstate commerce in violation of the Commerce Clause. At the trial appellants presented extensive, uncontradicted evidence that the 65-foot doubles are as safe as, if not safer than, 55-foot singles when operated on limited-access, four-lane divided highways, and also presented uncontradicted evidence that their operations are disrupted, their costs raised, and their service slowed by the challenged regulations because they are forced to haul doubles across the State separately or around the State or to incur delays caused by using singles instead of doubles to pick up and deliver goods, and are prevented from accepting interline transfers of 65-foot doubles. In addition appellants' evidence showed that Wisconsin routinely allows a great number and variety of vehicles over 55 feet long to operate on state highways. A three-judge court ruled against appellants. *Held:* On the record, the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and make no more than the most speculative contribution to highway safety. The great number of exceptions to the general 55-foot rule, and especially those that discriminate in favor of local industry, weaken the presumption of validity in favor of the general limit, because they undermine the assumption that the State's

own political processes will act as a check on local regulations that unduly burden interstate commerce. Pp. 439–448.

417 F. Supp. 1352, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which all other Members joined except STEVENS, J., who took no part in the consideration or decision of the case. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., and BRENNAN and REHNQUIST, JJ., joined, *post*, p. 448.

John H. Lederer argued the cause for appellants. With him on the briefs were *Jack R. DeWitt* and *Jon P. Axelrod.*

Albert Harriman, Assistant Attorney General of Wisconsin, argued the cause for appellees. With him on the brief were *Bronson C. La Follette,* Attorney General, *pro se,* and *Charles A. Bleck,* Assistant Attorney General.*

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether administrative regulations of the State of Wisconsin governing the length and configuration of trucks that may be operated within the State violate the Commerce Clause because they unconstitutionally burden or discriminate against interstate commerce. The three-judge District Court held that the regulations are not unconstitutional on either ground. Because we conclude that they unconstitutionally burden interstate commerce, we reverse.

I

Appellant Raymond Motor Transportation, Inc. (Raymond), a Minnesota corporation with its principal place of business in

*Briefs of *amici curiae* urging affirmance were filed by *Theodore L. Sendak,* Attorney General, and *Donald P. Bogard* for the State of Indiana; by *Anthony F. Troy,* Attorney General, *Walter A. McFarlane,* Deputy Attorney General, and *Valentine W. Southall, Jr.,* Assistant Attorney General, for the Commonwealth of Virginia; and by *Richard T. Conway, Harry J. Breithaupt, Jr.,* and *E. Parker Brown* for the Association of American Railroads.

Minneapolis, is a common carrier of general commodities by motor vehicle. Operating pursuant to a certificate of public convenience and necessity granted by the Interstate Commerce Commission, see 49 U. S. C. §§ 306–308, Raymond provides service in eastern North Dakota, Minnesota, northern Illinois, and northwestern Indiana. Its primary interstate route is between Chicago and Minneapolis. It does not serve any points in Wisconsin.

Appellant Consolidated Freightways Corporation of Delaware (Consolidated), a Delaware corporation with its principal place of business in Menlo Park, Cal., also is a common carrier of general commodities by motor vehicle. Consolidated operates nationwide, providing service under a certificate of public convenience and necessity in 42 States and Canada. Among other routes, Consolidated carries commodities between Chicago, Detroit, and points east, and Minneapolis and points west to Seattle. Unlike Raymond, Consolidated does carry commodities between Wisconsin and other States, and it maintains terminals in Milwaukee and Madison where truckloads of goods are dispatched and received.

Both Raymond and Consolidated use two different kinds of trucks. One consists of a three-axle power unit (tractor) which pulls a single two-axle trailer that is 40 feet long. The overall length of such a single-trailer unit (single) is 55 feet. This unit has been used on the Nation's highways for many years and is an industry standard. The other type truck consists of a two-axle tractor which pulls a single-axle trailer to which a single-axle dolly and a second single-axle trailer are attached. Each trailer is 27 feet long, and the overall length of such a double-trailer unit (double) is 65 feet.[1]

The double, which has come into increasing use in recent years, is thought to have certain advantages over the single

[1] Appendix A of the District Court opinion contains illustrations of both kinds of trucks. 417 F. Supp. 1352, 1363 (WD Wis. 1976) (*per curiam*).

for general commodities shipping.[2] Because of these advantages, Raymond would prefer to use doubles on its route between Chicago and Minneapolis. Consolidated would prefer to use doubles on its routes between Chicago, Detroit, and points east, and Minneapolis and points west, as well as on its routes commencing and ending in Milwaukee and Madison. The most direct route for all of this traffic is over Interstate Highways 90 and 94, both of which cross Wisconsin between Illinois and Minnesota. State law allows 65-foot doubles to be operated on interstate highways and access roads in Michigan, Illinois, Minnesota, and all of the States west from Minnesota to Washington through which Interstate Highways 90 and 94 run.

Wisconsin law, however, generally does not allow trucks longer than 55 feet to be operated on highways within that State. The key statutory provision is Wis. Stat. § 348.07 (1) (1975), which sets a limit of 55 feet on the overall length of a vehicle pulling one trailer.[3] Any person operating a single-trailer unit of greater length must obtain a permit issued by the State Highway Commission. In addition, § 348.08 (1)

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[2] A double can carry a greater volume of general commodities than a single, often without exceeding legal limits on gross vehicle weights. Thus, fewer doubles than singles are needed to carry a given amount of cargo, with consequent savings in fuel and drivers' time. In addition, because the trailers of a double can be routed separately, cargo can be picked up from various shippers, dispatched, and delivered to various destinations more quickly by use of doubles than singles.

[3] Subsequent to the District Court's decision, this section was amended to allow single-trailer units up to 59 feet long to be operated without a permit "providing the cargo or cargo space of the semitrailer is 45 feet or less in length and the truck tractor is within the statutory limit in sub. (1)." 1977 Wis. Laws, ch. 29, § 1487h, adding § 348.07 (2) (g).

Exempted from the length limit of § 348.07 (1) are combinations of mobile homes and their towing vehicles, if their overall length does not exceed 60 feet, § 348.07 (2) (d), and implements of husbandry operated temporarily upon the highway, § 348.07 (2) (e).

provides that no vehicle pulling more than one other vehicle shall be operated on a highway without a permit.[4]

The Commission is authorized to issue various classes of annual permits for the operation of vehicles that do not conform to the above requirements. In particular, it may issue "trailer train" permits for the operation of combinations of more than two vehicles "consisting of truck tractors, trailers, semitrailers or wagons which do not exceed a total length of 100 feet," § 348.27 (6).[5] The Commission may also "impose

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[4] The District Court assumed that § 348.08 (1) generally allows double-trailer trucks up to 55 feet long to be operated without permits. See 417 F. Supp., at 1354–1355. The State concedes that this assumption was erroneous. Tr. of Oral Arg. 34–37. The section, however, does exempt from its permit requirement combinations of two vehicles pulled by a third and "being transported by the drive-away method in saddle-mount combination," where overall length does not exceed 55 feet, § 348.08 (1)(a); combinations of farm tractors pulling two trailers or one trailer and one implement of husbandry, if the combination is used exclusively for farming and its overall length does not exceed 55 feet, § 348.08 (1)(b); and "tour trains" operated primarily on county and municipal roads for recreational or educational purposes, § 348.08 (1)(c). The terms "drive-away method" and "saddle-mount combination" in § 348.08 (1)(a) are not defined by the statute or regulations, but they apparently refer to a method of towing one four-wheel motor vehicle by resting its front wheels on the back of a second four-wheel motor vehicle. See 49 CFR §§ 390.9, 393.71, and 393.17 (1976).

[5] The Commission also is authorized to issue annual permits to operate overlength vehicles "to industries and to their agent motor carriers owning and operating oversize vehicles in connection with interplant, and from plant to state line, operations in this state," § 348.27 (4); "to pipeline companies or operators or public service corporations for transportation of poles, pipe, girders and similar materials . . . used in its [*sic*] business," § 348.27 (5); "to companies and individuals hauling peeled or unpeeled pole-length forest products used in its [*sic*] business," provided that overall length does not exceed 65 feet, § 348.27 (5); "to auto carriers operating 'haulaways' specially constructed to transport motor vehicles," provided that overall length does not exceed 65 feet, § 348.27 (5); "to licensed mobile home transport companies and to licensed mobile home manufacturers and dealers authorizing them to transport oversize mobile homes," § 348.27 (7); to persons transporting "loads of pole length and pulpwood

such reasonable conditions" and "adopt such reasonable rules" of operation with respect to vehicles operated under permit "as it deems necessary for the safety of travel and protection of the highways," § 348.25 (3), including specification of the routes to be used by permittees.

The Commission has issued administrative regulations setting forth the conditions under which "trailer train" and other classes of permits will be issued. Although the Commission is empowered by § 348.27 (6) to issue "trailer train" permits to operate double-trailer trucks up to 100 feet long, its regulations restrict such permits to "the operation of vehicles used for the transporting of municipal refuse or waste, or for the interstate or intra-state operation without load of vehicles in transit from manufacturer or dealer to purchaser or dealer, or for the purpose of repair." Wis. Admin. Code § Hy 30.14 (3)(a) (July 1975). "Trailer train" permits also are issued "for the operation of a combination of three vehicles used for the transporting of milk from the point of production to the point of first processing," § Hy 30.18 (3)(a) (June 1976).

II

The overture to this lawsuit began when Raymond and Consolidated each applied to the appropriate Wisconsin

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exceeding statutory length . . . limitations . . . for a distance not to exceed 3 miles from the Michigan-Wisconsin state line," § 348.27 (9); and to other persons "[f]or good cause in specified instances . . . for a specified period . . . [to] allow loads exceeding the size . . . limitations imposed by this chapter," § 348.27 (3).

Section 348.25 (4) provides that permits "shall be issued only for the transporting of a single article or vehicle which exceeds statutory size . . . limitations and which cannot reasonably be divided or reduced to comply with statutory size . . . limitations . . . ." The Commission by regulation, however, exempts general, industrial interplant, and double-trailer milk truck permits from this requirement. Wis. Admin. Code § Hy 30.01 (3)(c) (June 1976). It appears that the Commission interprets § 348.25 (4) to require only that it would be less economical, rather than physically impossible, to divide a load. See App. 200, 210, 211–212.

officials under § 348.27 (6) for annual permits to operate 65-foot doubles on Interstate Highways 90 and 94 between Illinois and Minnesota and, in Consolidated's case, on short stretches of four-lane divided highways between the interstate highways and freight terminals in Milwaukee and Madison.[6] The permits were denied because appellants' proposed operations were not within the narrow scope of the administrative regulations that specify when "trailer train" permits will be issued. Appellants then filed suit in Federal District Court seeking declaratory and injunctive relief on the ground that the regulations barring the proposed operation of 65-foot doubles burden and discriminate against interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3.[7] The complaint alleged that the State's refusal to issue the requested permits disrupts and delays appellants' transportation of commodities in interstate commerce; that 65-foot doubles are as safe as, if not safer than, the 55-foot singles that are allowed to operate on Wisconsin highways without permits; and that the maze of statutory and administrative exceptions to the general prohibition against operating vehicles longer than 55 feet results in "'over-length' permits [being] routinely granted to classes of vehicles indistinguishable from those of the Plaintiffs in terms of size, safety, and divisibility of loads . . . ." App. 18.

A three-judge District Court was convened pursuant to 28

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[6] Consolidated also sought authority to operate over Interstate Highway 894, an alternative route which bypasses the Milwaukee metropolitan area.

[7] The complaint named as defendants, individually and in their official capacities, Rice, the Secretary of the Wisconsin Department of Transportation; Huber, the Chairman of the Wisconsin Highway Commission; Sweda and Young, members of the Commission; Volk, the Chief Traffic Engineer of Wisconsin; Versnik, the commanding officer of the Wisconsin State Patrol; and LaFollette, the Attorney General of Wisconsin. We shall refer to the defendants collectively as "the State."

The complaint also stated a claim under the Equal Protection Clause of the Fourteenth Amendment which the District Court rejected and which we do not reach.

U. S. C. § 2281.[8] After a pretrial conference, the court directed the State to file an amended answer setting forth every justification for its refusal to issue the permits sought, "such as safety, for example." App. 25. The State's amended answer advanced highway safety as its sole justification. *Id.*, at 27–29. By agreement of the parties, the case was tried on affidavits, depositions, and exhibits.

Appellants presented a great deal of evidence supporting their allegation that 65-foot doubles are as safe as, if not safer than, 55-foot singles when operated on limited-access, four-lane divided highways. For example, the Deputy Director of the Bureau of Motor Carrier Safety, Federal Highway Administration, United States Department of Transportation, testified on deposition that the Bureau's five-year study of the accident experience of selected motor carriers that use both types of trucks showed that doubles are safer than singles in terms of the number of accidents, injuries, and fatalities per 100,000 miles, and in terms of the amount of property damage and number of injuries and fatalities per accident. The deponent's own expert opinion was that doubles are safer because of the articulation between the first and second trailers, which allows greater maneuverability and prevents the back wheels of the second trailer from deviating from the path of the front wheels of the tractor (offtracking) as much as the back wheels of a 55-foot single; because loads typically are distributed more evenly in doubles than in singles; and because doubles typically have better braking capability than singles.

Other experts testified that 65-foot doubles brake as well as 55-foot singles, maneuver and track better, are less prone to jackknife, and produce less splash and spray to obscure the vision of drivers in following and passing vehicles. These

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[8] Section 2281 was repealed by Pub. L. 94–381, 90 Stat. 1119, the day before the three-judge court's decision in this case. The repeal, however, did not affect actions commenced on or before its date of enactment. See § 7 of Pub. L. 94–381, 90 Stat. 1120.

experts agreed that the difference in the amount of time needed to pass a 55-foot single and a 65-foot double has no appreciable effect on motorist safety on limited-access, four-lane divided highways. Appellants also produced depositions and affidavits of state highway safety officials from 12 of the States where 65-foot doubles are allowed on some or all highways; all shared the opinion that 65-foot doubles are as safe as 55-foot singles.[9]

The State, for reasons unexplained, made no effort to contradict this evidence of comparative safety with evidence of its own.[10] The Chairman of the State Highway Commission, while acknowledging the Commission's statutory authority to issue the permits sought by appellants, testified that the regulations preventing their issuance are not based on an administrative assessment of the safety of 65-foot doubles, and he himself was "not prepared to make a statement relative to the safety of these vehicles." App. 250. The reason for the Commission's adoption of these regulations, according to the Chairman, was its belief that the people of the State did not want more vehicles over 55 feet long on the State's highways.[11] The

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[9] According to a stipulated exhibit, at the time of trial only 17 States and the District of Columbia did not allow 65-foot doubles on their highways. A few more permitted their operation on designated highways, and the rest allowed them on all highways. App. 278. For a more detailed summary of current state laws regulating truck length and configuration, see American Association of State Highway and Transportation Officials, Legal Maximum Dimensions and Weights of Motor Vehicles Compared with AASHTO Standards (1976).

[10] The State did introduce expert testimony that occupants of smaller vehicles are more likely to be killed in collisions with large trucks than occupants of larger vehicles. The study upon which this testimony was based did not distinguish between 55-foot singles and 65-foot doubles, and the State's expert witness had no opinion as to their relative safety. App. 154.

[11] He also said that the state legislature, in response to this feeling, had declined to enact legislation that would have allowed 65-foot doubles to be operated without permits. He interpreted this legislative inaction as

State produced no evidence, nor has it made any suggestion in this Court, that 65-foot doubles are less safe than 55-foot singles because of their extra trailer, as distinguished from their extra length.[12]

Appellants also produced uncontradicted evidence showing that their operations are disrupted, their costs are raised, and their service is slowed by the challenged regulations. For example, Consolidated ordinarily finds it faster and less expensive to use 65-foot doubles to carry interstate freight originating from or destined for Milwaukee and Madison. To comply with Wisconsin law, however, an interstate double bound for Wisconsin must stop before entering the State and detach one of its two trailers. Consolidated then pulls each trailer separately to the freight terminal in Milwaukee or Madison. Likewise, each trailer of a double outbound from one of those cities must be pulled across the Wisconsin state line separately, at which point they are united into a double-trailer combination. Consolidated maintains a crew of drivers in Wisconsin whose sole responsibility is to shuttle second trailers to and from the state line.

On routes through Wisconsin between Chicago and Minneapolis, both Consolidated and Raymond are compelled to use 55-foot singles instead of 65-foot doubles because each trailer of a double would have to be pulled by a separate tractor on the portion of the route that is in Wisconsin. On its long east-west routes from Detroit and Chicago to Seattle, Consolidated must divert doubles south of Wisconsin through Missouri and Nebraska in order to avoid Wisconsin's ban.[13]

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evidence of a legislative intent that the Commission should not issue permits for such trucks, despite its statutory power to do so.

[12] Indeed, the State agrees that "[a]ppellants have shown that 65 foot twin trailers have as good a safety record as other large vehicles." Brief for Appellees 13.

[13] It appears that 65-foot doubles must be routed as far south as Missouri because Iowa, which Interstate Highway 80 crosses on an east-west route, also bans 65-foot doubles.

These routes would involve a considerably shorter distance if Consolidated's trucks could go through Wisconsin.[14]

Finally, appellants' evidence demonstrated that Wisconsin routinely allows a great number and variety of vehicles over 55 feet long to be operated on the State's highways. App. 178–181.

The three-judge court ruled against appellants. 417 F. Supp. 1352 (WD Wis. 1976) (*per curiam*). The court found that the Wisconsin regulatory scheme does not discriminate against interstate commerce. *Id.*, at 1356–1358. The court also considered "whether the burden imposed upon interstate commerce outweighs the benefits to the local popul[ace]," *id.*, at 1358, and concluded that it did not. It thought that appellants had not shown that the State's refusal to issue permits for appellants' 65-foot doubles had no relation to highway safety, pointing to the fact that, other things being equal, it takes longer for a motorist to pass a 65-foot truck than a 55-foot truck. *Id.*, at 1359. The court considered the expense imposed on appellants to be "of no material consequence." *Id.*, at 1361. We noted probable jurisdiction. 430 U. S. 914 (1977).

III

Appellants challenge both branches of the District Court's holding. First, they contend that the State's refusal to issue the requested "trailer train" permits under § 348.27 (6) burdens interstate commerce in violation of the Commerce Clause because it substantially interferes with the movement of goods in interstate commerce and makes no contribution to highway

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[14] An officer of Consolidated estimated that it costs the company in excess of $2 million annually to make the various adjustments in operations that are required by Wisconsin law. An officer of Raymond estimated that the company could save up to $63,000 annually on fuel and up to $102,000 annually on drivers' wages if it could use 65-foot doubles on its route between Chicago and Minneapolis.

safety. Second, they argue that § 348.27 (4), authorizing issuance of "interplant" permits, see n. 5, *supra*, discriminates against interstate commerce in violation of the Commerce Clause because it allows permits to be issued to carry the products of Wisconsin industries, but not of other States' industries, over Wisconsin highways in trucks longer than 55 feet. We find it necessary to address the second contention only as it bears on the first.

By its terms, the Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States . . . ." Long ago it was settled that even in the absence of a congressional exercise of this power, the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce. *Cooley* v. *Board of Wardens*, 12 How. 299 (1852); see *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366, 370–371 (1976). At the same time, however, it never has been doubted that much state legislation, designed to serve legitimate state interests and applied without discrimination against interstate commerce, does not violate the Commerce Clause even though it affects commerce. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 531–532 (1949); see *Gibbons* v. *Ogden*, 9 Wheat. 1, 203–206 (1824); *id.*, at 235 (Johnson, J., concurring). "[I]n areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims,' *H. P. Hood & Sons, Inc.* v. *Du Mond*, *supra*, at 553 (Black, J., dissenting) . . . ." *Great A&P Tea Co.* v. *Cottrell*, *supra*, at 371; see *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977).

In this process of "delicate adjustment," the Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate com-

merce,[15] but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case.[16] Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce. As the Court stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it

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[15] *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1852), distinguished between subjects "imperatively demanding a single uniform rule" and subjects "imperatively demanding that diversity, which alone can meet the local necessities." Other cases have distinguished between state regulations that affect interstate commerce "directly," and those that affect it "indirectly." *E. g., Hall* v. *DeCuir*, 95 U. S. 485, 488 (1878); *Smith* v. *Alabama*, 124 U. S. 465, 482 (1888). And many cases have distinguished between regulations that are an exercise of the State's "police powers," and those that are "regulations of commerce." *E. g., Railroad Co.* v. *Fuller*, 17 Wall. 560, 570 (1873); *Smith* v. *Alabama*, *supra*, at 482.

[16] See, *e. g., Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (1927) (Stone, J., dissenting); *Parker* v. *Brown*, 317 U. S. 341, 362–363 (1943); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 768–769 (1945); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 552–553 (1949) (Black, J., dissenting).

could be promoted as well with a lesser impact on interstate activities."

Accord, *Great A&P Tea Co.* v. *Cottrell, supra,* at 371–372; *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794, 804 (1976); see also *Hunt* v. *Washington Apple Advertising Comm'n, supra,* at 350.

In the instant case, appellants do not dispute that a State has a legitimate interest in regulating motor vehicles using its roads in order to promote highway safety. Nor do they contend that federal regulation has pre-empted state regulation of truck length or configuration.[17] They argue, however, that the burden imposed upon interstate commerce by the Wisconsin regulations challenged here is, in the language of *Pike* v. *Bruce Church, Inc.,* "clearly excessive in relation to the putative local benefits." Appellants contend that the regulations were shown by uncontradicted evidence to make no contribution to highway safety, while imposing a burden on interstate commerce that is substantial in terms of expense and delay. They analogize this case to *Bibb* v. *Navajo Freight Lines,* 359 U. S. 520 (1959), where the Court invalidated an Illinois law, defended on the ground that it promoted highway safety, that required trailers of trucks driven within Illinois to be equipped with contour mudguards.

The State replies that the general rule of *Pike* is not applicable to a State's regulation of motor vehicles in the promotion of safety. It contends that we should be guided, instead, by *South Carolina Highway Dept.* v. *Barnwell Bros., Inc.,* 303 U. S. 177 (1938), which upheld over Commerce Clause objections a state law that set stricter limitations on truck width and weight than did surrounding States' laws. The State

[17] Congress has considered pre-empting this field, but it has not acted. See, *e. g.,* S. Rep. No. 93–1111, p. 10 (1974); Hearings on Transportation and the New Energy Policies (Truck Sizes and Weights) before the Subcommittee on Transportation of the Senate Committee on Public Works, 93d Cong., 2d Sess. (1974).

emphasizes that *Barnwell Bros.* applied a "rational relation" test rather than a "balancing" test, and argues that its regulations bear a rational relation to highway safety: Longer trucks take longer to pass or be passed than shorter trucks.

We acknowledge, as did the Court in *Bibb*, that there is language in *Barnwell Bros.* "which, read in isolation from . . . later decisions . . . , would suggest that no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in absence of some element of discrimination against interstate commerce." 359 U. S., at 528–529. But *Bibb* rejected such a suggestion by stating the test to be applied to state highway regulation in terms similar in principle to the subsequent formulation in *Pike* v. *Bruce Church, Inc.*:

> "Unless we can conclude on the whole record that 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it' . . . we must uphold the statute." 359 U. S., at 524, quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 775–776 (1945).

Thus, we cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce.

Nevertheless, it also is true that the Court has been most reluctant to invalidate under the Commerce Clause " 'state legislation in the field of safety where the propriety of local regulation has long been recognized.' " *Pike* v. *Bruce Church, Inc., supra*, at 143, quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan, supra*, at 796 (Douglas, J., dissenting). In no field has this deference to state regulation been greater than that of highway safety regulation. See, *e. g.*, *Hendrick* v. *Maryland*, 235 U. S. 610 (1915); *Sproles* v. *Binford*, 286 U. S.

374 (1932); *Maurer* v. *Hamilton*, 309 U. S. 598 (1940); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949).[18] Thus, those who would challenge state regulations said to promote highway safety must overcome a "strong presumption of [their] validity." *Bibb, supra*, at 524.

Despite the strength of this presumption, we are persuaded by the record in this case that the challenged regulations unconstitutionally burden interstate commerce. As we have shown, appellants produced a massive array of evidence to disprove the State's assertion that the regulations make some contribution to highway safety. The State, for its part, virtually defaulted in its defense of the regulations as a safety measure. Both it and the District Court were content to assume that the regulations contribute to highway safety because appellants' 65-foot doubles take longer to pass or be passed than the 55-foot singles. Yet appellants produced uncontradicted evidence that the difference in passing time does not pose an appreciable threat to motorists traveling on limited access, four-lane divided highways.[19] They also

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[18] The Court's special deference to state highway regulations derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations. Compare *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 187 (1938), with *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S., at 783. It also derives from a recognition that the States shoulder primary responsibility for the construction, maintenance, and policing of their highways, and that highway conditions may vary widely from State to State. See *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520, 523–524 (1959); *Barnwell Bros., supra*, at 187.

[19] The District Court, without mentioning this evidence, suggested that language in *Morris* v. *Duby*, 274 U. S. 135, 144 (1927), and *Buck* v. *Kuykendall*, 267 U. S. 307, 315 (1925), established a principle "that for purposes of judicial review of state highway legislation, size restrictions might be deemed inherently tied to public safety . . . ." 417 F. Supp., at 1360. The language relied upon does not go so far, and it antedates

showed that the Highway Commission routinely allows many other vehicles 55 feet or longer to use the State's highways. In short, the State's assertion that the challenged regulations contribute to highway safety is rebutted by appellants' evidence and undercut by the maze of exemptions from the general truck-length limit that the State itself allows.[20]

Moreover, appellants demonstrated, again without contradiction, that the regulations impose a substantial burden on the interstate movement of goods. The regulations substantially increase the cost of such movement, a fact which is not, as the District Court thought, entirely irrelevant.[21] In addition, the regulations slow the movement of goods in interstate commerce by forcing appellants to haul doubles across the State separately, to haul doubles around the State altogether, or to incur the delays caused by using singles instead of doubles to pick up and deliver goods. See *Bibb*, 359 U. S., at 527. Finally, the regulations prevent appellants from accepting interline transfers of 65-foot doubles for movement through Wisconsin from carriers that operate only in the 33 States where the doubles are legal. See *id.*, at 527–528.[22] In our

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the era of the limited-access, four-lane divided highways involved in this case. Size restrictions, like other highway safety regulations, are entitled to a strong presumption of validity, but this presumption cannot justify a court in closing its eyes to uncontroverted evidence of record.

[20] The State's failure to present any evidence to rebut appellants' showing in itself sets this case apart from *Barnwell Bros.*, see 303 U. S., at 196, and even from *Bibb*, see 359 U. S., at 525.

[21] The District Court said: "That compliance with Wisconsin regulations imposes added costs upon the plaintiffs is a fact of no material consequence." 417 F. Supp., at 1361, citing *Bibb*, *supra*, at 526. In *Bibb*, the Court thought that the cost to carriers of installing the mudguards required by Illinois would not, in itself, require invalidation of the Illinois law. See 359 U. S., at 526. But the Court also made it clear that "[c]ost taken into consideration with other factors might be relevant in some cases to the issue of burden on commerce." *Ibid.*

[22] The State contends that its regulations do not interfere with interlining as seriously as the Illinois law at issue in *Bibb* because 65-foot doubles

view, the burden imposed on interstate commerce by Wisconsin's regulations is no less than that imposed by the statute invalidated in *Bibb*.[23]

One other consideration, although not decisive, lends force to our conclusion that the challenged regulations cannot stand. As we have noted, Wisconsin's regulatory scheme contains a great number of exceptions to the general rule that vehicles over 55 feet long cannot be operated on highways within the State. At least one of these exceptions discriminates on its face in favor of Wisconsin industries and against the industries of other States,[24] and there are indications in the record that a

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"may freely be hauled through Wisconsin, but, of course, they must be hauled one at a time. . . . This does not prevent interlining, it just makes it more expensive." Brief for Appellees 11. This contention overlooks the fact that in *Bibb* interlining could have continued if either the originating or the connecting carriers had been willing to bear the expense of installing the contour mudguards required by Illinois law.

[23] The State argues that this case is distinguishable from *Bibb* because the contour mudguards required by Illinois were illegal in Arkansas, and the straight mudguards required by Arkansas were illegal in Illinois. Here, by contrast, the 55-foot singles that are legal in Wisconsin are not illegal in any other State. But the State fails to appreciate that the conflict between the Illinois and Arkansas requirements in *Bibb* was important because of the added burden of delay and expense that it imposed on carriers operating between the two States. The conflict would have required such carriers to stop somewhere between Illinois and Arkansas, either to shift cargo from one trailer to another, 359 U. S., at 526, or to change mudguards on the original trailer, *id.*, at 527.

We also note that the interference with interlining that weighed in the *Bibb* decision did not result from the conflict between the Illinois and Arkansas requirements, but rather from the fact that many originating carriers did not operate in Illinois and hence "would not be expected to equip [their] trailers with contour mudguards." *Id.*, at 528.

[24] Under Wis. Stat. § 348.27 (4) (1975), the Commission issues permits to Wisconsin industries and their agent motor carriers to transport goods in trucks over 55 feet long from plants in Wisconsin to the state line, and thence to markets in other States, but it does not issue permits to industries with plants in other States to transport goods in trucks over 55 feet long *through* Wisconsin to markets in other States. The District Court's

number of the other exceptions, although neutral on their face, were enacted at the instance of, and primarily benefit, important Wisconsin industries. Viewed realistically, these exceptions may be the product of compromise between forces within the State that seek to retain the State's general truck-length limit, and industries within the State that complain that the general limit is unduly burdensome. Exemptions of this kind, however, weaken the presumption in favor of the validity of the general limit, because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce. See n. 18, *supra*.

IV

On this record, we are persuaded that the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety. Our holding is a narrow one, for we do not decide whether laws of other States restricting the operation of trucks over 55 feet long, or of double-trailer trucks, would be upheld if the evidence produced on the safety issue were not so overwhelmingly one-sided as in this case.[25] The State of

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sua sponte speculation that industries in States other than Wisconsin also might be eligible for permits under § 348.27 (4), see 417 F. Supp., at 1357 n. 9, is refuted by the record, see App. 257–258, and was disavowed by the State, Tr. of Oral Arg. 30; see Brief for Appellees 4.

Given our conclusion that the regulations preventing issuance of the requested permits unconstitutionally burden interstate commerce, we find it unnecessary to decide whether appellants would be entitled to relief solely on the basis of the discrimination against interstate commerce embodied in § 348.27 (4). Compare Brief for Appellees 4, and Brief for Association of American Railroads as *Amicus Curiae* 20, with Reply Brief for Appellants 39. Neither do we intimate that nondiscriminatory exceptions to general length, width, or weight limits are inherently suspect. Cf. *Sproles* v. *Binford*, 286 U. S. 374, 391–396 (1932).

[25] As one commentator has written, Commerce Clause adjudication must depend in large part "upon the thoroughness with which the lawyers

Wisconsin has failed to make even a colorable showing that its regulations contribute to highway safety. The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE REHNQUIST join, concurring.

I join the opinion of the Court, but I add these comments to emphasize the narrow scope of today's decision.

First, the Court's reliance on *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), does not signal, for me, a new approach to review of state highway safety regulations under the Commerce Clause. Wisconsin argues that the Court previously has refused to balance safety considerations against burdens on interstate commerce. Brief for Appellees 8. This contention misreads *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520 (1959), which recognized the Court's responsibility to weigh the national interest in free-flowing commerce against " 'slight or problematical' " safety interests. *Id.*, at 524, quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 776 (1945).

Second, the reliance on *Pike* should not be read to equate the factual balance struck here with the balance established in *Pike* regarding the Arizona Fruit and Vegetable Standardization Act. Arizona prohibited interstate shipment of canta-

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perform their task in the conduct of constitutional litigation. Here, as in many other fields, constitutionality is conditioned upon the facts, and to the lawyers the courts are entitled to look for garnering and presenting the facts." Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, 27–28 (1940).

loupes not "packed in regular compact arrangement in closed standard containers." 397 U. S., at 138, quoting Ariz. Rev. Stat. Ann. § 3–503C (Supp. 1969). Application of the prohibition to the appellee grower would have prevented it from processing its cantaloupes just across the state line in California, and would have required it to construct a packing facility in Arizona. The State attempted to justify this burden on interstate commerce solely by its interest "to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging." 397 U. S., at 143. More specifically, Arizona wanted the appellee to package the cantaloupes in the State so that the high-quality fruit could be advertised as grown in Arizona rather than California. Although recognizing the legitimacy of the State's interest, the Court refused to accord the concern much weight in the Commerce Clause balancing:

> "[T]he State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State." *Id.*, at 145.

In short, despite the unchallenged existence and legitimacy of the State's interest, the Court determined that the interest was not important enough to justify the burden on commerce.

Neither the *Pike* opinion nor today's decision suggests that a similar balance would be struck when a State legitimately asserts the existence of a safety justification for a regulation. In *Pike* itself the Court noted that it did not confront " 'state legislation in the field of safety where the propriety of local regulation has long been recognized.' " *Id.*, at 143, quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S., at 796 (Douglas, J., dissenting). In other words, if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce. I therefore join

the opinion of the Court because its ultimate balancing does not depart from this principle, as stated in *Bibb* v. *Navajo Freight Lines:*

> "These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field." 359 U. S., at 524.

Here, the Court does not engage in a balance of policies; it does not make a legislative choice. Instead, after searching the factual record developed by the parties, it concludes that the safety interests have not been shown to exist as a matter of law.

Third, the illusory nature of the safety interests in this case is illustrated not only by the overwhelming empirical data submitted by the appellants, but also by the State's willingness to permit the use of oversized vehicles under the numerous administrative exceptions for in-state manufacturers and important Wisconsin industries. See *ante*, at 433–434, nn. 4–5, and 446–447. From 1973 through June 1975, the State issued 43,900 annual or general permits for the use of vehicles longer than 65 feet. Brief of Plaintiffs before the District Court in Case No. 75–C–172, App. C, 10–11. An additional 16,760 single-trip permits were granted during the same period. *Id.*, at 11. Despite the alleged safety problems, the State regularly permitted the use of oversized vehicles merely to lower the cost of transportation for in-state industries. The bulkiness of the cargoes frequently did not justify the permits. See Deposition of Robert T. Huber, Chairman of the Wisconsin State Highway Commission, 7–9, 21; Deposition of Wayne Volk, Chief Traffic Engineer, Wisconsin Department of Transportation, 31, 36, 49–50, 53. American Motors, one of the State's largest employers, received permission to use oversized trucks on the 45-mile stretch of highway between Milwaukee

and Kenosha, even though the State's Chief Traffic Engineer conceded that the road was heavily traveled. Deposition of Wayne Volk, *supra*, at 32. Furthermore, Stoughton Body Co., a Wisconsin manufacturer of trailers, received permits to pull oversized, double-trailer vehicles on a two-lane highway to facilitate out-of-state deliveries. *Id.*, at 52–54. The record therefore suggests that the State in practice does not believe that oversized, double-trailer vehicles present a threat to highway safety.

Nineteen years after *Bibb*, then, the Court has been presented with another of those cases—"few in number"—in which highway safety regulations unconstitutionally burden interstate commerce. See 359 U. S., at 529. The contour-mudflaps law burdened the flow of commerce through Illinois in 1959 just as the length and configuration regulations burden the flow through Wisconsin today. It was shown that neither the mudflaps law nor the regulations contributed to highway safety. Giving the same legislative leeway to Wisconsin that the Court gave to Illinois, *Bibb* v. *Navajo Freight Lines* requires reversal of the judgment of the District Court.

UNITED STATES STEEL CORP. ET AL. *v.* MULTISTATE TAX COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 76-635. Argued October 11, 1977—Decided February 21, 1978

The Multistate Tax Compact was entered into by a number of States for the stated purposes of (1) facilitating proper determination of state and local tax liability of multistate taxpayers; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. To these ends, the Compact created the appellee Multistate Tax Commission. Each member State is authorized to request that the Commission perform an audit on its behalf, and the Commission may seek compulsory process in aid of its auditing power in the courts of any State specifically permitting such procedure. Individual States retain complete control over all legislative and administrative action affecting tax rates, the composition of the tax base, and the means and methods of determining tax liability and collecting any taxes due. Each member State is free to adopt or reject the Commission's rules and regulations, and to withdraw from the Compact at any time. Appellants, on behalf of themselves and all other multistate taxpayers threatened with Commission audits, brought this action in District Court against appellees (the Commission, its members, and its Executive Director) challenging the constitutionality of the Compact on the grounds, *inter alia*, that (1) it is invalid under the Compact Clause of the Constitution (which provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State"); (2) it unreasonably burdens interstate commerce; and (3) it violates the rights of multistate taxpayers under the Fourteenth Amendment. A three-judge court granted summary judgment for appellees. *Held:*

1. The Multistate Tax Compact is not invalid under the rule of *Virginia* v. *Tennessee*, 148 U. S. 503, 519, that the application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." Pp. 459–478.

(a) The Compact's multilateral nature and its establishment of

an ongoing administrative body do not, standing alone, present significant potential for conflict with the principles underlying the Compact Clause. The number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy, and the powers delegated to the administrative body must also be judged in terms of such enhancement. P. 472.

(b) Under the test of whether the particular compact enhances state power *quoad* the Federal Government, this Compact does not purport to authorize member States to exercise any powers they could not exercise in its absence, nor is there any delegation of sovereign power to the Commission, each State being free to adopt or reject the Commission's rules and regulations and to withdraw from the Compact at any time. Pp. 472–473.

(c) Appellants' various contentions that certain procedures and requirements of the Commission encroach upon federal supremacy with respect to interstate commerce and foreign relations and impair the sovereign rights of nonmember States, are without merit, primarily because each member State could adopt similar procedures and requirements individually without regard to the Compact. Even if state power is enhanced to some degree, it is not at the expense of federal supremacy. Pp. 473–478.

2. Appellants' allegations that the Commission has abused its powers by harassing members of the plaintiff class in that it induced several States to issue burdensome requests for production of documents and to deviate from state law by issuing arbitrary assessments against taxpayers who refuse to comply with such orders, do not establish that the Compact violates the Commerce Clause or the Fourteenth Amendment. But even if such allegations were supported by the record, they are irrelevant to the facial validity of the Compact, it being only the individual State, not the Commission, that has the power to issue an assessment, whether arbitrary or not. Pp. 478–479.

417 F. Supp. 795, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 479.

Erwin N. Griswold argued the cause for appellants. With him on the briefs were *Thomas McGanney*, *Richard A. Hoppe*, and *Todd B. Sollis*.

William D. Dexter argued the cause for appellees. With him on the brief was *Samuel N. Greenspoon.**

MR. JUSTICE POWELL delivered the opinion of the Court.

The Compact Clause of Art. I, § 10, cl. 3, of the Constitution provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." The Multistate Tax Compact, which established the Multistate Tax Commission, has not received congressional approval. This appeal requires us to decide whether the Compact is invalid for that reason. We also are required to decide whether it impermissibly encroaches on congressional power under the Commerce Clause and whether it operates in violation of the Fourteenth Amendment.

I

The Multistate Tax Compact was drafted in 1966 and became effective, according to its own terms, on August 4, 1967, after seven States had adopted it. By the inception of this litigation in 1972, 21 States had become members.[1] Its

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*A brief of *amici curiae* urging affirmance was filed for their respective States by *William J. Baxley*, Attorney General of Alabama; *Bruce E. Babbitt*, Attorney General of Arizona; *Carl R. Ajello*, Attorney General of Connecticut; *Robert L. Shevin*, Attorney General of Florida; *Arthur K. Bolton*, Attorney General of Georgia; *William J. Scott*, Attorney General of Illinois; *Francis B. Burch*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *Rufus L. Edmisten*, Attorney General of North Carolina; *Warren R. Spannaus*, Attorney General of Minnesota; *Brooks McLemore*, Attorney General of Tennessee; *Chauncey H. Browning, Jr.*, Attorney General of West Virginia; and for the State of Louisiana by *David Dawson*.

John H. Larson filed a brief for the County of Los Angeles as *amicus curiae*.

[1] Those States were: Alaska, Alaska Stat. Ann. § 43.19.010 (1977); Arkansas, Ark. Stat. Ann. § 84–4101 (Supp. 1977); Colorado, Colo. Rev. Stat. § 24–60–1301 (1973); Florida, Fla. Stat. § 213.15 (1971); Haw. Rev. Stat. § 255–1 (Supp. 1976); Idaho, Idaho Code § 63–3701 (1976); Illinois,

formation was a response to this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), and the congressional activity that followed in its wake.

In *Northwestern States*, this Court held that net income from the interstate operations of a foreign corporation may be subjected to state taxation, provided that the levy is nondiscriminatory and is fairly apportioned to local activities that form a sufficient nexus to support the exercise of the taxing power. This prompted Congress to enact a statute, Act of Sept. 14, 1959, Pub. L. 86–272, 73 Stat. 555, which sets forth certain minimum standards for the exercise of that power.[2] It also authorized a study for the purpose of recommending legislation establishing uniform standards to be observed by the States in taxing income of interstate businesses. Although

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Ill. Rev. Stat., ch. 120, § 871 (1973); Indiana, Ind. Code § 6–8–9–101 (1972); Kansas, Kan. Stat. Ann. § 79–4301 (1969); Michigan, Mich. Comp. Laws § 205.581 (1970); Missouri, Mo. Rev. Stat. § 32.200 (1969); Montana, Mont. Rev. Codes Ann. § 84–6701 (Supp. 1977); Nebraska, Neb. Rev. Stat. § 77–2901 (1943); Nevada, Nev. Rev. Stat. § 376.010 (1973); New Mexico, N. M. Stat. Ann. § 72–15A–37 (Supp. 1975); North Dakota, N. D. Cent. Code § 57–59–01 (1972); Oregon, Ore. Rev. Stat. § 305.655 (1977); Texas, Tex. Rev. Civ. Stat. Ann., Art. 7359a (Vernon Supp. 1977); Utah, Utah Code Ann. § 59–22–1 (1953 and Supp. 1977); Washington, Wash. Rev. Code § 82.56.010 (1974); Wyoming, Wyo. Stat. § 39–376 (Supp. 1975).

Since the suit began, four States—Florida, Illinois, Indiana, and Wyoming—have withdrawn from the Compact, see 1976 Fla. Laws, ch. 76–149, § 1; 1975 Ill. Laws, No. 79–639, § 1; 1977 Ind. Acts, No. 90; 1977 Wyo. Sess. Laws, ch. 44, § 1. Two others—California and South Dakota—have joined it, see Cal. Rev. & Tax. Code Ann. § 38001 (West Supp. 1977); S. D. Comp. Laws Ann. § 10–54–1 (Supp. 1977), for a current total of 19 members.

[2] Title I of Pub. L. 86–272, codified as 15 U. S. C. §§ 381–384, essentially forbids the imposition of a tax on a foreign corporation's net income derived from activities within a State, if those activities are limited to the solicitation of orders that are approved, filled, and shipped from a point outside the State.

the results of the study were published in 1964 and 1965,[3] Congress has not enacted any legislation dealing with the subject.[4]

While Congress was wrestling with the problem, the Multistate Tax Compact was drafted.[5] It symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer. In accord with that recognition, Art. I of the Compact states four purposes: (1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation.

To these ends, Art. VI creates the Multistate Tax Commission, composed of the tax administrators from all the member States. Section 3 of Art. VI authorizes the Commission (i) to study state and local tax systems; (ii) to develop and recommend proposals for an increase in uniformity and compatibility of state and local tax laws in order to encourage simplicity and improvement in state and local tax law and administration; (iii) to compile and publish information that may assist member States in implementing the Compact and taxpayers in complying with the tax laws; and

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[3] H. R. Rep. No. 1480, 88th Cong., 2d Sess. (1964); H. R. Rep. No. 565, 89th Cong., 1st Sess. (1965); H. R. Rep. No. 952, 89th Cong., 1st Sess. (1965).

[4] There have been several unsuccessful attempts. H. R. 11798, 89th Cong., 1st Sess. (1965); H. R. 16491, 89th Cong., 2d Sess. (1966); S. 317, 92d Cong., 1st Sess. (1971); H. R. 1538, 92d Cong., 1st Sess. (1971); S. 1245, 93d Cong., 1st Sess. (1973); H. R. 977, 93d Cong., 1st Sess. (1973); S. 2080, 94th Cong., 1st Sess. (1975); H. R. 9, 94th Cong., 1st Sess. (1975).

[5] The model Act proposed as the Multistate Tax Compact, with minor exceptions, has been adopted by each member State.

(iv) to do all things necessary and incidental to the administration of its functions pursuant to the Compact.

Articles VII and VIII detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law.

Article VIII applies only in those States that specifically adopt it by statute. It authorizes any member State or its subdivision to request that the Commission perform an audit on its behalf. The Commission, as the State's auditing agent, may seek compulsory process in aid of its auditing power in the courts of any State that has adopted Art. VIII. Information obtained by the audit may be disclosed only in accordance with the laws of the requesting State. Moreover, individual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.

Article X permits any party to withdraw from the Compact by enacting a repealing statute. The Compact's other provisions are of less relevance to the matter before us.[6]

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[6] Article II consists of definitions. Article III permits small taxpayers—those whose only activities within the jurisdiction consist of sales totaling less than $100,000—to elect to pay a tax on gross sales in lieu of a levy on net income. The Uniform Division of Income for Tax Purposes Act, contained in Art. IV, allows multistate taxpayers to apportion and allocate their income under formulae and rules set forth in the Compact or by any other method available under state law. It was approved by the National Conference of Commissioners on Uniform State Laws and the American

In 1972, appellants brought this action on behalf of themselves [7] and all other multistate taxpayers threatened with audits by the Commission. They named the Commission, its individual Commissioners, and its Executive Director as defendants. Their complaint challenged the constitutionality of the Compact on four grounds: (1) the Compact, never having received the consent of Congress,[8] is invalid under the Compact Clause; (2) it unreasonably burdens interstate commerce; (3) it violates the rights of multistate taxpayers under the Fourteenth Amendment; and (4) its audit provisions violate the Fourth and Fourteenth Amendments. Appellants sought a declaratory judgment that the Compact is invalid and a permanent injunction barring its operation.

The complaint survived a motion to dismiss. 367 F. Supp. 107 (SDNY 1973). After extensive discovery, appellees moved for summary judgment. A three-judge District Court,

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Bar Association in 1957. Article V deals with sales and use taxes. Article IX provides for arbitration of disputes, but is not in effect. Article XI disclaims any attempt to affect the power of member States to fix rates of taxation or limit the jurisdiction of any court. Finally, Art. XII provides for liberal construction and severability.

[7] The action was filed by United States Steel Corp., Standard Brands Inc., General Mills, Inc., and the Procter & Gamble Distributing Co. On February 5, 1974, the court below permitted Bethlehem Steel Corp., Bristol Myers Co., Eltra Corp., Goodyear Tire & Rubber Co., Green Giant Co., International Business Machines Corp., International Harvester Co., International Paper Co., International Telephone & Telegraph Corp., McGraw-Hill, Inc., NL Industries, Inc., Union Carbide Corp., and Xerox Corp. to intervene as plaintiffs. The court below ordered that the suit proceed as a class action. International Business Machines and Xerox withdrew as intervenor plaintiffs before decision.

[8] Congressional consent has been sought, but never obtained. See S. 3892, 89th Cong., 2d Sess. (1966); S. 883, 90th Cong., 1st Sess. (1967); S. 1551, 90th Cong., 1st Sess. (1967); H. R. 9476, 90th Cong., 1st Sess. (1967); H. R. 13682, 90th Cong., 1st Sess. (1967); S. 1198, 91st Cong., 1st Sess. (1969); H. R. 6246, 91st Cong., 1st Sess. (1969); H. R. 9873, 91st Cong., 1st Sess. (1969); S. 1883, 92d Cong., 1st Sess. (1971); H. R. 6160, 92d Cong., 1st Sess. (1971); S. 3333, 92d Cong., 2d Sess. (1972); S. 2092, 93d Cong., 1st Sess. (1973).

convened pursuant to 28 U. S. C. § 2281, rejected appellants' claim that the record would not support summary judgment. 417 F. Supp. 795, 798 (SDNY 1976). Turning to the merits, the District Court first rejected the contention that the Compact Clause requires congressional consent to every agreement between two or more States. The court cited *Virginia* v. *Tennessee,* 148 U. S. 503 (1893), and *New Hampshire* v. *Maine,* 426 U. S. 363 (1976), in support of its holding that consent is necessary only in the case of a compact that enhances the political power of the member States in relation to the Federal Government. The District Court found neither enhancement of state political power nor encroachment upon federal supremacy. Concluding that appellants' Commerce Clause, Fourth Amendment, and Fourteenth Amendment claims also lacked merit, the District Court granted summary judgment for appellees.

Before this Court, appellants have abandoned their search-and-seizure claim. Although they preserved their claim relating to the propriety of summary judgment, we find no reason to disturb the conclusion of the court below on that point. We have before us, therefore, appellant's contentions under the Compact Clause, the Commerce Clause, and the Fourteenth Amendment. We consider first the Compact Clause contention.

II

Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States. The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in *Virginia* v. *Tennessee, supra.* His conclusion that the Clause could not be read literally was approved in subsequent dicta,[9] but this Court did not have

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[9] *E. g., Wharton* v. *Wise,* 153 U. S. 155, 168–170 (1894); *North Carolina* v. *Tennessee,* 235 U. S. 1, 16 (1914).

occasion expressly to apply it in a holding until our recent decision in *New Hampshire* v. *Maine, supra.*

Appellants urge us to abandon *Virginia* v. *Tennessee* and *New Hampshire* v. *Maine,* but provide no effective alternative other than a literal reading of the Compact Clause. At this late date, we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy. We have examined, nevertheless, the origin and development of the Clause, to determine whether history lends controlling support to appellants' position.

Article I, § 10, cl. 1, of the Constitution—the Treaty Clause—declares: "No State, shall enter into Any Treaty, Alliance or Confederation . . . ." Yet Art. I, § 10, cl. 3—the Compact Clause—permits the States to enter into "agreements" or "compacts," so long as congressional consent is obtained. The Framers clearly perceived compacts and agreements as differing from treaties.[10] The records of the Consti-

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[10] The history of interstate agreements under the Articles of Confederation suggests the same distinction between "treaties, alliances, and confederations" on the one hand, and "agreements and compacts" on the other. Article VI provided in part as follows:

"No State without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any confe[r]ence, agreement, alliance or treaty, with any king, prince or state . . . .

"No two or more States shall enter into any treaty, confederation, or alliance whatever, between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."

Congressional consent clearly was required before a State could enter into an "agreement" with a foreign state or power or before two or more States could enter into "treaties, alliances, or confederations." Apparently, however, consent was not required for mere "agreements" between States. "The articles inhibiting any treaty, confederation, or alliance between the States without the consent of Congress . . . were not designed to prevent arrangements between adjoining States to facilitate the free intercourse

tutional Convention, however, are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause.[11] This suggests that the Framers used

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of their citizens, or remove barriers to their peace and prosperity . . . ." *Wharton* v. *Wise, supra,* at 167.

For example, the Virginia-Maryland Compact of 1785, which governed navigation and fishing rights in the Potomac River, the Pocomoke River, and the Chesapeake Bay, did not receive congressional approval, yet no question concerning its validity under Art. VI ever arose. As the Court noted in *Wharton* v. *Wise,* in reference to the 1785 Compact, "looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles. Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles to land in their respective States, without the consent of Congress, which indicated that such consent was not deemed essential to their validity." 153 U. S., at 170–171.

[11] On July 25, 1787, the Convention created a Committee of Detail composed of John Rutledge, James Wilson, Edmund Randolph, Nathaniel Gorham, and Oliver Elsworth. The Convention then adjourned until August 6 to allow the Committee to prepare a draft. 2 M. Farrand, Records of the Federal Convention of 1787, pp. 97, 128 (1911). Section 10 of the Committee's first draft provided in part: "No State shall enter into any Treaty, Alliance or Confederation with any foreign Power nor witht. Const. of U. S. into any agreemt. or compact wh another State or Power . . . ." *Id.,* at 169 (abbreviations in original). On August 6, the Committee submitted a draft to the Convention containing the following articles:

"XII No State shall . . . enter into any treaty, alliance, or confederation . . . .

"XIII No State, without the consent of the Legislature of the United States, shall . . . enter into any agreement or compact with another State, or with any foreign power . . . ." *Id.,* at 187.

The Committee of Style, created to revise the draft, reported on September 12, *id.,* at 590, but nothing appears to have been said about Art. I, § 10, which contained the treaty and compact language incor-

the words "treaty," "compact," and "agreement" as terms of art, for which no explanation was required [12] and with which we are unfamiliar. Further evidence that the Framers ascribed

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porated into the Constitution as approved on September 17. The records of the state ratification conventions also shed no light. Publius declared only that the prohibition against treaties, alliances, and confederation, "for reasons which need no explanation, is copied into the new Constitution," while the portion of Art. I, § 10, containing the Compact Clause fell "within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark." The Federalist, No. 44, pp. 299, 302 (J. Cooke ed. 1961) (J. Madison).

[12] Some commentators have theorized that the Framers understood those terms in relation to the precisely defined categories, fashionable in the contemporary literature of international law, of accords between sovereigns. See, *e. g.*, Engdahl, Characterization of Interstate Arrangements: When Is a Compact Not a Compact?, 64 Mich. L. Rev. 63 (1965); Weinfeld, What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?, 3 U. Chi. L. Rev. 453 (1936). The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel. 1 J. Kent, Commentaries on American Law 18 (1826). In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book "has been continually in the hands of the members of our Congress now sitting . . . ." 2 F. Wharton, United States Revolutionary Diplomatic Correspondence 64 (1889), cited in Weinfeld, *supra*, at 458.

Vattel differentiated between "treaties," which were made either for perpetuity or for a considerable period, and "agreements, conventions, and pactions," which "are perfected in their execution once for all." E. Vattel, Law of Nations 192 (J. Chitty ed. 1883). Unlike a "treaty" or "alliance," an "agreement" or "paction" was perfected upon execution:

"[T]hose compacts, which are accomplished once for all, and not by successive acts,—are no sooner executed then they are completed and perfected. If they are valid, they have in their own nature a perpetual and irrevocable effect . . . ." *Id.*, at 208.

This distinction between supposedly ongoing accords, such as military alliances, and instantaneously executed, though perpetually effective, agreements, such as boundary settlements, may have informed the drafting in Art. I, § 10. The Framers clearly recognized the necessity for amicable resolution of boundary disputes and related grievances. See *Virginia* v. *West Virginia*, 246 U. S. 565, 597–600 (1918); Frankfurter & Landis, The

precise meanings to these words appears in contemporary commentary.[13]

Whatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost. In 1833, Mr. Justice Story perceived no clear distinction among any of the terms.[14] Lacking any clue as to the categorical defini-

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Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685, 692–695 (1925). Interstate agreements were a method with which they were familiar. *Id.*, at 694, 732–734. Although these dispositive compacts affected the interests of the States involved, they did not represent the continuing threat to the other States embodied in a "treaty of alliance," to use Vattel's words. E. Vattel, *supra*, at 192.

[13] St. George Tucker, who along with Madison and Edmund Randolph was a Virginia commissioner to the Annapolis Convention of 1786, drew a distinction between "treaties, alliances, and confederations" on the one hand, and "agreements or compacts" on the other:

"The former relate ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time; the power of making these is altogether prohibited to the individual states; but agreements, or compacts, concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties, may still be entered into by the respective states, with the consent of congress." 1 W. Blackstone, Commentaries, Appendix 310 (S. Tucker ed. 1803) (footnotes omitted).

Tucker cited Vattel as authority for his interpretation of Art. I, § 10.

[14] Mr. Justice Story found Tucker's view, see n. 13, *supra*, unilluminating:

"What precise distinction is here intended to be taken between *treaties*, and *agreements*, and *compacts*, is nowhere explained, and has never as yet been subjected to any exact judicial or other examination. A learned commentator, however, supposes, that the former ordinarily relate to subjects of great national magnitude and importance, and are often perpetual, or for a great length of time; but that the latter relate to transitory or local concerns, or such as cannot possibly affect any other interests but those of the parties [citing Tucker]. But this is at best a very loose and unsatisfactory exposition, leaving the whole matter open to the most latitudinarian construction. What are subjects of great national magnitude and importance? Why may not a compact or agreement between States be perpetual? If it may not, what shall be its duration? Are not treaties often made for short periods, and upon questions of local interest, and for

tions the Framers had ascribed to them, Mr. Justice Story developed his own theory. Treaties, alliances, and confederations, he wrote, generally connote military and political accords and are forbidden to the States. Compacts and agreements, on the other hand, embrace "mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other." 2 J. Story, Commentaries on the Constitution of the United States § 1403, p. 264 (T. Cooley ed. 1873). In the latter situations, congressional consent was required, Story felt, "in order to check any infringement of the rights of the national government." *Ibid.*

The Court's first opportunity to comment on the scope of the Compact Clause, *Holmes* v. *Jennison*, 14 Pet. 540 (1840), proved inconclusive. Holmes had been arrested in Vermont on a warrant issued by Jennison, the Governor. The warrant apparently reflected an informal agreement by Jennison to deliver Holmes to authorities in Canada, where he had been indicted for murder. On a petition for habeas corpus, the Supreme Court of Vermont held Holmes' detention lawful. Although this Court divided evenly on the question of its jurisdiction to review the decision, Mr. Chief Justice Taney, in an opinion joined by Mr. Justice Story and two others, addressed the merits of Holmes' claim that Jennison's informal agreement to surrender him fell within the scope of the Compact

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temporary objects?" 2 J. Story, Commentaries on the Constitution of the United States § 1402, p. 263 (T. Cooley ed. 1873) (footnotes omitted).

In *Green* v. *Biddle*, 8 Wheat. 1 (1823), the Court, including Mr. Justice Story, had been presented with a question of the validity of the Virginia-Kentucky Compact of 1789, to which Congress had never expressly assented. Henry Clay argued to the Court that the Compact Clause extended "to all agreements or compacts, no matter what is the subject of them. It is immaterial, therefore, whether that subject be harmless or dangerous to the Union." *Id.*, at 39. The Court did not address that issue, however, for it held that Congress' consent could be implied. *Id.*, at 87.

Clause. Mr. Chief Justice Taney focused on the fact that the agreement in question was between a State and a foreign government. Since the clear intention of the Framers had been to cut off all communication between the States and foreign powers, *id.*, at 568–579, he concluded that the Compact Clause would permit an arrangement such as the one at issue only if "made under the supervision of the United States . . . ," *id.*, at 578. In his separate opinion, Mr. Justice Catron expressed disquiet over what he viewed as Mr. Chief Justice Taney's literal reading of the Compact Clause, noting that it might threaten agreements between States theretofore considered lawful.[15]

Despite Mr. Justice Catron's fears, courts faced with the task of applying the Compact Clause appeared reluctant to strike down newly emerging forms of interstate cooperation.[16] For example, in *Union Branch R. Co.* v. *East Tennessee & G. R. Co.*, 14 Ga. 327 (1853), the Supreme Court of Georgia rejected a Compact Clause challenge to an agreement between Tennessee and Georgia concerning the construction of an interstate railroad. Omitting any mention of *Holmes* v. *Jennison*, the Georgia court seized upon Story's observation that the words "treaty, alliance, and confederation" generally were known to

[15] Notwithstanding Mr. Justice Catron's unease, Mr. Chief Justice Taney's opinion in *Jennison* is not inconsistent with the rule of *Virginia* v. *Tennessee*. At some length, Taney emphasized that the State was exercising the power to extradite persons sought for crimes in other countries, which was part of the exclusive foreign relations power expressly reserved to the Federal Government. He concluded, therefore, that the State's agreement would be constitutional only if made under the supervision of the United States.

After the *Jennison* case had been disposed of by the Court, the Vermont court discharged Holmes. It concluded from an examination of the five separate opinions in the case that a majority of this Court believed the Governor had no power to deliver Holmes to Canadian authorities. *Holmes* v. *Jennison*, 14 Pet. 540, 597 (1840) (Reporter's Note).

[16] See generally Abel, Interstate Cooperation as a Child, 32 Iowa L. Rev. 203 (1947); Engdahl, *supra*, n. 12, at 86.

apply to treaties of a political character. Without explanation, the court transferred this description of the Treaty Clause to the Compact Clause, which it perceived as restraining the power of the States only with respect to agreements "which might limit, or infringe upon a full and complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution . . . ." 14 Ga., at 339.[17] A broader prohibition could not have been intended, since it was unnecessary to protect the Federal Government.[18] Unless this view was taken, said the court:

"We must hold that a State, without the consent of

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[17] The court failed to mention that Story described the terms of the Treaty Clause, not the Compact Clause, as political. It was the political character of treaties, in his view, that led to their absolute prohibition. Story theorized that the Compact Clause dealt with "private rights of sovereignty," see *supra*, at 464, but that congressional consent was required to prevent possible abuses.

[18] Taking a similar view of the Compact Clause, and also ignoring *Holmes* v. *Jennison*, were *Dover* v. *Portsmouth Bridge*, 17 N. H. 200 (1845), and *Fisher* v. *Steele*, 39 La. Ann. 447, 1 So. 882 (1887). *Holmes* v. *Jennison* apparently was not cited in a case relating to the Compact Clause until 1917, 14 years after Mr. Justice Field formulated the rule of *Virginia* v. *Tennessee*. See *McHenry County* v. *Brady*, 37 N. D. 59, 70, 163 N. W. 540, 544 (1917).

Mr. Chief Justice Taney may have shared the Georgia court's view of compacts which, unlike the "agreement" in *Holmes* v. *Jennison*, did not implicate the foreign relations power of the United States. A year after *Union Branch R. Co.* was decided, he suggested in dictum that the Compact Clause is aimed at an accord that is "in its nature, a political question, to be settled by compact made by the political departments of the government." *Florida* v. *Georgia*, 17 How. 478, 494 (1855). The purpose of the Clause, he declared, is "to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others." A similar concern with agreements of a political nature may be found in a dictum of Mr. Chief Justice Marshall:

"It is worthy of remark, too, that these inhibitions [of Art. I, §10]

> Congress, can make no sort of contract, whatever, with another State. That it cannot sell to another state, any portion of public property, . . . though it may so sell to individuals. . . .
>
> "We can see no advantage to be gained by, or benefit in such a provision; and hence, we think it was not intended." *Id.*, at 340.

It was precisely this approach that formed the basis in 1893 for Mr. Justice Field's interpretation of the Compact Clause in *Virginia* v. *Tennessee*. In that case, the Court held that Congress tacitly had assented to the running of a boundary between the two States. In an extended dictum, however, Mr. Justice Field took the Court's first opportunity to comment upon the Compact Clause since the neglected essay in *Holmes* v. *Jennison*. Mr. Justice Field, echoing the puzzlement expressed by Story 60 years earlier, observed:

> "The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control." 148 U. S., at 517–518.

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generally restrain state legislation on subjects entrusted to the general government, or in which the people of all the states feel an interest.

"A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty making power which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution." *Barron* v. *Baltimore*, 7 Pet. 243, 249 (1833).

Mr. Justice Field followed with four examples of interstate agreements that could in "no respect concern the United States": (1) an agreement by one State to purchase land within its borders owned by another State; (2) an agreement by one State to ship merchandise over a canal owned by another; (3) an agreement to drain a malarial district on the border between two States; and (4) an agreement to combat an immediate threat, such as invasion or epidemic. As the Compact Clause could not have been intended to reach every possible interstate agreement, it was necessary to construe the terms of the Compact Clause by reference to the object of the entire section in which it appears: [19]

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.*, at 519.

Mr. Justice Field reiterated this functional view of the Compact Clause a year later in *Wharton* v. *Wise*, 153 U. S. 155, 168–170 (1894).

Although this Court did not have occasion to apply Mr. Justice Field's test for many years, it has been cited with approval on several occasions. *Louisiana* v. *Texas*, 176 U. S. 1, 17 (1900); *Stearns* v. *Minnesota*, 179 U. S. 223, 246–248 (1900); *North Carolina* v. *Tennessee*, 235 U. S. 1, 16 (1914).[20]

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[19] In support of this conclusion, Mr. Justice Field misread Story's Commentaries in precisely the same way as the Georgia court did in *Union Branch R. Co.* See n. 17, *supra*.

[20] State courts repeatedly have applied the test in confirming the validity of a variety of interstate agreements. *E. g.*, *McHenry County* v. *Brady*, *supra*; *Dixie Wholesale Grocery, Inc.* v. *Martin*, 278 Ky. 705, 129 S. W. 2d 181, cert. denied, 308 U. S. 609 (1939); *Ham* v. *Maine-New Hampshire Interstate Bridge Authority*, 92 N. H. 268, 30 A. 2d 1 (1943); *Roberts Tobacco Co.* v. *Department of Revenue*, 322 Mich. 519, 34 N. W.

Moreover, several decisions of this Court have upheld a variety of interstate agreements effected through reciprocal legislation without congressional consent. *E. g., St. Louis & S. F. R. Co.* v. *James,* 161 U. S. 545 (1896); *Hendrick* v. *Maryland,* 235 U. S. 610 (1915); *Bode* v. *Barrett,* 344 U. S. 583 (1953); *New York* v. *O'Neill,* 359 U. S. 1 (1959). While none of these cases explicitly applied the *Virginia* v. *Tennessee* test, they reaffirmed its underlying assumption: not all agreements between States are subject to the strictures of the Compact Clause.[21] In *O'Neill,* for example, this Court upheld the Uniform Law to Secure the Attendance of Witnesses from Within or Without

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2d 54 (1948); *Bode* v. *Barrett,* 412 Ill. 204, 106 N. E. 2d 521 (1952), aff'd, 344 U. S. 583 (1953); *Landes* v. *Landes,* 1 N. Y. 2d 358, 135 N. E. 2d 562, appeal dismissed, 352 U. S. 948 (1956); *Ivey* v. *Ayers,* 301 S. W. 2d 790 (Mo. 1957); *State* v. *Doe,* 149 Conn. 216, 178 A. 2d 271 (1962); *General Expressways, Inc.* v. *Iowa Reciprocity Board,* 163 N. W. 2d 413 (Iowa, 1968); *Kinnear* v. *Hertz Corp.,* 86 Wash. 2d 407, 545 P. 2d 1186 (1976). See also *Henderson* v. *Delaware River Joint Toll Bridge Comm'n,* 362 Pa. 475, 66 A. 2d 843 (1949); *Opinion of the Justices,* 344 Mass. 770, 184 N. E. 2d 353 (1962); *State* v. *Ford,* 213 Tenn. 582, 376 S. W. 2d 486 (1964); *Dresden School Dist.* v. *Hanover School Dist.,* 105 N. H. 286, 198 A. 2d 656 (1964); *Colgate-Palmolive Co.* v. *Dorgan,* 225 N. W. 2d 278 (N. D. 1974).

[21] One commentator has noted the relevance of reciprocal-legislation cases, particularly those involving reciprocal tax statutes, to Compact Clause adjudication:

"Compact clause adjudication focuses on a federalism formula suggested in an 1893 Supreme Court case [*Virginia* v. *Tennessee*]: congressional consent is required to validate only those compacts infringing upon 'the political power or influence' of particular states and 'encroaching . . . upon the full and free exercise of Federal authority.' Reciprocal tax statutes, which provide the paradigm instance of arrangements not deemed to require the consent of Congress, illustrate this principle in that they neither project a new presence onto the federal system nor alter any state's basic sphere of authority." Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682, 712 (1976) (footnotes omitted).

the State in Criminal Proceedings, which had been enacted in 41 States and Puerto Rico. That statute permitted the judge of a court of any enacting State to invoke the process of the courts of a sister State for the purpose of compelling the attendance of witnesses at criminal proceedings in the requesting State. Although no Compact Clause question was directly presented, the Court's opinion touched upon similar concerns:

> "The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution. Far from being divisive, this legislation is a catalyst of cohesion. It is within the unrestricted area of action left to the States by the Constitution." 359 U. S., at 6.

The reciprocal-legislation cases support the soundness of the *Virginia* v. *Tennessee* rule, since the mere form of the interstate agreement cannot be dispositive. Agreements effected through reciprocal legislation [22] may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized "compact." Mr. Chief Justice Taney considered this point in *Holmes* v. *Jennison*, 14 Pet., at 573:

> "Can it be supposed, that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the constitution to place the question upon the formality with which the agreement is made."

The Clause reaches both "agreements" and "compacts," the

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[22] See also Frankfurter & Landis, *supra*, n. 12, at 690–691.

formal as well as the informal.[23] The relevant inquiry must be one of impact on our federal structure.

This was the status of the *Virginia* v. *Tennessee* test until two Terms ago, when we decided *New Hampshire* v. *Maine*, 426 U. S. 363 (1976). In that case we specifically applied the test and held that an interstate agreement locating an ancient boundary did not require congressional consent. We reaffirmed Mr. Justice Field's view that the "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" *Id.*, at 369, quoting *Virginia* v. *Tennessee*, 148 U. S., at 519. This rule states the proper balance between federal and state power with respect to compacts and agreements among States.

Appellants maintain that history constrains us to limit application of this rule to bilateral agreements involving no independent administrative body. They argue that this Court never has upheld a multilateral agreement creating an active administrative body with extensive powers delegated to it by the States, but lacking congressional consent. It is true that most multilateral compacts have been submitted for congressional approval. But this historical practice, which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling.[24] It

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[23] Although there is language in *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 27 (1951), that could be read to suggest that the formal nature of a "compact" distinguishes it from reciprocal legislation, that language, properly understood, does not undercut our analysis. Referring in dictum to the compact at issue in *Dyer*, Mr. Justice Frankfurter observed that congressional consent had been required, "as for all compacts." The word "compact" in that phrase must be understood as a term of art, meaning those agreements falling within the scope of the Compact Clause. Cf. Frankfurter & Landis, *supra* n. 12, at 690, and n. 22a. Otherwise, the word "agreement" is read out of Art. I, § 10, cl. 3, entirely.

[24] Appellants describe various Compacts, including the Interstate Com-

is also true that the precise interstate mechanism involved in this case has not been presented to this Court before. *New York* v. *O'Neill, supra,* however, involving analogous multilateral arrangements, stands as an implicit rejection of appellants' proposed limitation of the *Virginia* v. *Tennessee* rule.

Appellants further urge that the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy. We agree. But the multilateral nature of the agreement and its establishment of an ongoing administrative body do not, standing alone, present significant potential for conflict with the principles underlying the Compact Clause. The number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy. As to the powers delegated to the administrative body, we think these also must be judged in terms of enhancement of state power in relation to the Federal Government. See *Virginia* v. *Tennessee, supra,* at 520 (establishment of commission to run boundary not a "compact"). We turn, therefore, to the application of the *Virginia* v. *Tennessee* rule to the Compact before us.

III

On its face the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There well may be some incremental

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pact to Conserve Oil and Gas Act of 1935, 49 Stat. 939, and the Interstate Compact to Conserve Oil and Gas (Extension) of 1976, 90 Stat. 2365, and attempt to show that they are similar to the Compact before us. They then point out that the Compacts they describe received the consent of Congress and argue from this fact that the Multistate Tax Compact also must receive congressional consent in order to be valid. These other Compacts are not before us. We have no occasion to decide whether congressional consent was necessary to their constitutional operation, nor have we any reason to compare those Compacts to the one before us. It suffices to test the Multistate Tax Compact under the rule of *Virginia* v. *Tennessee.*

increase in the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But the test is whether the Compact enhances state power *quoad* the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above, each State is free to withdraw at any time. Despite this apparent compatibility of the Compact with the interpretation of the Clause established by our cases, appellants argue that the Compact's effect is to threaten federal supremacy.

A

Appellants contend initially that the Compact encroaches upon federal supremacy with respect to interstate commerce. This argument, as we understand it, has four principal components. It is claimed, first, that the Commission's use in its audits of "unitary business" and "combination of income" methods [25] for determining a corporate taxpayer's income creates a risk of multiple taxation for multistate businesses. Whether or not this risk is a real one, it cannot be attributed to the existence of the Multistate Tax Commission. When the Commission conducts an audit at the request of a member

[25] The "unitary business" technique involves calculating a corporate taxpayer's net income on the basis of all phases of the operation of a single enterprise (*e. g.*, production of components, assembly, packing, distribution, sales), even if located outside the jurisdiction. The portion of that income attributable to activities within the taxing State is then determined by means of an apportionment formula. See, *e. g.*, *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920). "Combination of income" involves applying the unitary business concept to separately incorporated entities engaged in a single enterprise. See *Edison California Stores, Inc.* v. *McColgan*, 30 Cal. 2d 472, 183 P. 2d 16 (1947).

State, it uses the methods adopted by that State. Since appellants do not contest the right of each State to adopt these procedures if it conducted the audits separately,[26] they cannot be heard to complain that a threat to federal supremacy arises from the Commission's adoption of the unitary-business standard in accord with the wishes of the member States. Indeed, to the extent that the Commission succeeds in promoting uniformity in the application of state taxing principles, the risks of multiple taxation should be diminished.

Appellants' second contention as to enhancement of state power over interstate commerce is that the Commission's regulations provide for apportionment of nonbusiness income. This allegedly creates a substantial risk of multiple taxation, since other States are said to allocate this income to the place of commercial domicile.[27] We note first that the regulations of the Commission do not require the apportionment of nonbusiness income. They do define business income, which is apportionable under the regulations, to include elements that

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[26] Individual States are free to employ the unitary-business standard. *Underwood Typewriter Co.* v. *Chamberlain, supra;* accord, *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271 (1924). Nor do appellants claim that individual States could not employ the combination method of determining taxpayer income. Cf. *Edison California Stores, supra.*

[27] Taxable income deemed *apportionable* is that which is not considered to have its source totally within one State. It is distributed by means of an apportionment formula among the States in which the multistate business operates. Taxable income deemed *allocable* is that which is considered as having its source within one State and is assigned entirely to that State for tax purposes. See generally Sharpe, State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity, 11 Colum. J. Law & Soc. Prob. 231, 233–239 (1975). "Business income" is defined generally as income arising from activities in the regular course of the taxpayer's business. See, *e. g.,* Uniform Division of Income for Tax Purposes Act § 1 (a). Definitions of income arising in the regular course of business vary from one State to another. For example, rents and royalities may be considered business income in one State, but not in another. See generally Sharpe, *supra,* at 233–239.

might be regarded as nonbusiness income in some States. P–H State & Local Tax Serv. ¶¶ 6100–6286 (1973). But again there is no claim that the member States could not adopt similar definitions in the absence of the Compact. Any State's ability to exact additional tax revenues from multistate businesses cannot be attributed to the Compact; it is the result of the State's freedom to select, within constitutional limits, the method it prefers.

The third aspect of the Compact's operation said to encroach upon federal commerce power involves the Commission's requirement that multistate businesses under audit file data concerning affiliated corporations. Appellants argue that the costs of compiling financial data of related corporations burden the conduct of interstate commerce for the benefit of the taxing States. Since each State presumably could impose similar filing requirements individually, however, appellants again do not show that the Commission's practices, as auditing agent for member States, aggrandize their power or threaten federal control of commerce. Moreover, to the extent that the Commission is engaged in joint audits, appellants' filing burdens well may be reduced.

Appellants' final claim of enhanced state power with respect to commerce is that the "enforcement powers" conferred upon the Commission enable that body to exercise authority over interstate business to a greater extent than the sum of the States' authority acting individually. This claim also falls short of meeting the standard of *Virginia* v. *Tennessee*. Article VIII of the Compact authorizes the Commission to require the attendance of persons and the production of documents in connection with its audits. The Commission, however, has no power to punish failures to comply. It must resort to the courts for compulsory process, as would any auditing agent employed by the individual States. The only novel feature of the Commission's "enforcement powers" is the provision in Art. VIII permitting the Commission to resort to the courts of any State adopting that Article. Adoption of the Article, then,

amounts to nothing more than reciprocal legislation for providing mutual assistance to the auditors of the member States. Reciprocal legislation making the courts of one State available for the better administration of justice in another has been upheld by this Court as a method "to accomplish fruitful and unprohibited ends." *New York* v. *O'Neill*, 359 U. S., at 11. Appellees make no showing that increased effectiveness in the administration of state tax laws, promoted by such legislation,[28] threatens federal supremacy. See n. 21, *supra*.

B

Appellants further argue that the Compact encroaches upon the power of the United States with respect to foreign relations. They contend that the Commission has conducted multinational audits in which it applied the unitary business method to foreign corporate taxpayers, in conflict with federal policy concerning the taxation of foreign corporations.[29]

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[28] For example, appellants raise no challenge to the many reciprocal statutes providing for recovery of taxes owing to one State in the courts of another. A typical statute is Tennessee's: "Any state of the United States or the political subdivisions thereof shall have the right to sue in the courts of Tennessee to recover any tax which may be owing to it when the like right is accorded to the state of Tennessee and its political subdivisions by such state." Tenn. Code Ann. § 20–1709 (1955). See generally Leflar, Out-of-State Collection of State and Local Taxes, 29 Vand. L. Rev. 443 (1976).

[29] Tax Convention with the United Kingdom of Great Britain and Northern Ireland, 94th Cong., 2d Sess. (1976) (as published in Message from President submitting Convention); Protocol to the 1975 Tax Convention with the United Kingdom of Great Britain and Northern Ireland, 94th Cong., 2d Sess. (1976) (as published in Message from President submitting Protocol); Second Protocol to the 1975 Tax Convention with the United Kingdom of Great Britain and Northern Ireland, 95th Cong., 1st Sess. (1977) (as published in Message from President submitting Second Protocol). Article 9, ¶ 4, of the treaty, which is currently pending before the Senate, would prohibit the combination of the income of any enterprise doing business in the United States with the income of related enterprises located in the United Kingdom.

This contention was not presented to the court below and in any event lacks substance. The existence of the Compact simply has no bearing on an individual State's ability to utilize the unitary business method in determining the income of a particular multinational taxpayer. *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924). The Commission, as auditing agent, adopts the method only at the behest of a State requesting an audit. To the extent that its use contravenes any foreign policy of the United States, the facial validity of the Compact is not implicated.

C

Appellants' final Compact Clause argument charges that the Compact impairs the sovereign rights of nonmember States. Appellants declare, without explanation, that if the use of the unitary business and combination methods continues to spread among the Western States, unfairness in taxation—presumably the risks of multiple taxation—will be avoidable only through the efforts of some coordinating body. Appellants cite the belief of the Commission's Executive Director that the Commission represents the only available vehicle for effective coordination,[30] and conclude that the Compact exerts undue pressure to join upon nonmember States in violation of their "sovereign right" to refuse.

We find no support for this conclusion. It has not been shown that any unfair taxation of multistate business resulting from the disparate use of combination and other methods will redound to the benefit of any particular group of States or to the harm of others. Even if the existence of such a situation were demonstrated, it could not be ascribed to the existence of the Compact. Each member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact

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[30] Corrigan, Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response, 29 Vand. L. Rev. 423, 441–442 (1976).

did not exist. Risks of unfairness and double taxation, then, are independent of the Compact.

Moreover, it is not explained how any economic pressure that does exist is an affront to the sovereignty of nonmember States. Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, see, *e. g., Austin* v. *New Hampshire*, 420 U. S. 656 (1975), it is not clear how our federal structure is implicated. Appellants do not argue that an individual State's decision to apportion nonbusiness income—or to define business income broadly, as the regulations of the Commission actually do—touches upon constitutional strictures. This being so, we are not persuaded that the same decision becomes a threat to the sovereignty of other States if a member State makes this decision upon the Commission's recommendation.

IV

Appellants further challenge, on relatively narrow grounds, the validity of the Multistate Tax Compact under the Commerce Clause and the Fourteenth Amendment.[31] They allege that the Commission has abused its powers by conducting a campaign of harassment against members of the plaintiff class. Specifically, they claim that the Commission induced eight States to issue burdensome requests for production of documents and to deviate from the provisions of state law by issuing arbitrary assessments against taxpayers who refuse to comply with these harassing production orders.

These allegations do not establish that the Compact is in violation either of the Commerce Clause or the Fourteenth Amendment. We observe first that this contention was not

[31] Appellants do not specify in their brief which Clause of the Fourteenth Amendment is violated. Our conclusion makes it unnecessary to consider each one.

presented to the court below. The only evidence of record relating to the allegations are statements in the affidavit of appellants' counsel and an ambiguous excerpt from a letter of the Commission to the Director of Taxation of the State of Hawaii, quoted therein. App. 51–53. On this fragile basis, we hardly would be justified in making an initial finding of fact that appellees engaged in the campaign sketched in the affidavit.

Even if appellants' factual allegations were supported by the record, they would be irrelevant to the facial validity of the Compact. As we have noted above, it is only the individual State, not the Commission, that has the power to issue an assessment—whether arbitrary or not. If the assessment violates state law, we must assume that state remedies are available.[32] *E. g., Colgate-Palmolive Co.* v. *Dorgan*, 225 N. W. 2d 278 (N. D. 1974).

V

We conclude that appellants' constitutional challenge to the Multistate Tax Compact fails.[33] We affirm the judgment of the District Court.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The majority opinion appears to concede, as I think it should, that the Compact Clause reaches interstate agree-

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[32] Appellants conceded this point in the hearing before the three-judge court. Tr. of Hearing, Feb. 3, 1976, pp. 16–18. Cf. *State Tax Comm'n* v. *Union Carbide Corp.*, 386 F. Supp. 250 (Idaho 1974).

[33] The dissent appears to confuse potential impact on "federal interests" with threats to "federal supremacy." It dwells at some length on the unsuccessful efforts to obtain express congressional approval of this Compact, relying on the introduction of bills that never reached the floor of either House. This history of congressional inaction is viewed as "demonstrat[ing] . . . a federal interest in the rules for apportioning multistate and

ments presenting even *potential* encroachments on federal supremacy. In applying its Compact Clause theory to the circumstances of the Multistate Tax Compact, however, the majority is not true to this view. For if the Compact Clause has any independent protective force at all, it must require the consent of Congress to an interstate scheme of such complexity and detail as this. The majority states it will

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multinational income," and as showing "a *potential* impact on federal concerns." *Post*, at 488, 489. That there is a federal interest no one denies.

The dissent's focus on the existence of federal concerns misreads *Virginia* v. *Tennessee* and *New Hampshire* v. *Maine*. The relevant inquiry under those decisions is whether a compact tends to increase the political power of the States in a way that "may encroach upon or interfere with the just supremacy of the United States." *Virginia* v. *Tennessee*, 148 U. S., at 519. Absent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval.

In this case, the Multistate Tax Compact is concerned with a number of state activities that affect interstate and foreign commerce. But as we have indicated at some length in this opinion, the terms of the Compact do not enhance the power of the member States to affect federal supremacy in those areas.

The dissent appears to argue that the political influence of the member States is enhanced by this Compact, making it more difficult—in terms of the political *process*—to enact pre-emptive legislation. We may assume that there is strength in numbers and organization. But enhanced capacity to lobby within the federal legislative process falls far short of threatened "encroach[ment] upon or interfer[ence] with the just supremacy of the United States." Federal power in the relevant areas remains plenary; no action authorized by the Constitution is "foreclosed," see *post*, at 491, to the Federal Government acting through Congress or the treatymaking power.

The dissent also offers several aspects of the Compact that are thought to confer "synergistic" powers upon the member States. *Post*, at 491–493. We perceive no threat to federal supremacy in any of those provisions. See, *e. g.*, *Virginia* v. *Tennessee*, *supra*, at 520.

watch for the mere *potential* of harm to federal interests, but then approves the Compact here for lack of *actual* proved harm.

I

The Constitution incorporates many restrictions on the powers of individual States. Some of these are explicit, some are inferred from positive delegations of power to the Federal Government. In the latter category falls the federal authority over interstate commerce.[1] The individual States have long been permitted to legislate, in a nondiscriminatory manner, over matters affecting interstate commerce, where Congress has not exerted its authority, and where the federal interest does not require a uniform rule. *Cooley* v. *Board of Wardens*, 12 How. 299 (1852); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761 (1945).

It is not denied by any party to this case that the apportionment of revenues, sales, and income of multistate and multinational corporations for taxation purposes is an area over which the Congress could exert authority, ousting the efforts of any States in the field. To date, however, the Federal Government has taken only limited steps in this context.[2] No federal legislation has been enacted, nor tax treaties ratified, that would interfere with any State's efforts to apply uniform apportionment rules, unitary business concepts, or single multistate audits of corporations. Hence, leaving to one side appellants' contentions that these matters inherently require uniform federal treatment, there is no

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[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U. S. Const., Art. I, § 8.

[2] Title 15 U. S. C. §§ 381–384, passed in 1959 as Pub. L. No. 86–272, 73 Stat. 555, limits the jurisdictional bases open to States whereby taxation authority may be exerted. More comprehensive federal regulation of this area has often been proposed; see *ante*, at 456 n. 4.

obstacle in the Commerce Clause to such action by an individual State.

The Compact Clause, however, is directed to joint action by more than one State. If its only purpose in the present context were to require the consent of Congress to agreements between States that would otherwise violate the Commerce Clause, it would have no independent meaning. The Clause must mean that some actions which would be permissible for individual States to undertake are not permissible for a group of States to *agree* to undertake.

There is much history from the Articles of Confederation to support that conclusion.[3] In framing the Constitution the

[3] Under the Articles of Confederation, dealings of the States with foreign governments and among themselves were separately treated. Article VI of the Articles of Confederation provided:

"§ 1. No State, without the Consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any confe[r]ence, agreement, alliance, or treaty, with any king, prince or State . . . ."

Thereafter, in that same Article, it was provided:

"§ 2. No two or more States shall enter into any treaty, confederation, or alliance whatever, between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."

There was thus no requirement that mere "agreements" between States be subjected to the approval of Congress. That the framers of the Articles recognized a distinction between treaties, alliances, and confederations on the one hand and agreements on the other is demonstrated by the differing language in the two paragraphs above quoted, taken from the same Article.

David Engdahl, in Characterization of Interstate Arrangements: When is a Compact not a Compact?, 64 Mich. L. Rev. 63, 81 (1965), has suggested a perceptive rationale for this difference in treatment. Article IX, § 2, of the Articles of Confederation provided:

"The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever . . . ."

And it specified an elaborate system by which the Congress would

new Republic was at pains to correct the divisive factors of the Government under the Articles; and among the most important of these were "compacts witht. the consent of Congs. as between Pena. and N. Jersey, and between Virga. & Maryd." James Madison, "Preface to Debates in the Convention of 1787," 3 M. Farrand, Records of the Federal Convention of 1787, p. 548 (1937). A compact between two States necessarily achieved some object unattainable, or attainable less conveniently, by separate States acting alone. Such effects were jealously guarded against, lest "the Fedl authy [be] violated." *Ibid.* It was the Federal Government's province to oversee conduct of a greater effect than a single State could accomplish, to protect both its own prerogative and that of the excluded States.[4]

Compacts and agreements between States were put in a separate constitutional category, and purposefully so. Nor is the form used by the agreeing States important; as the majority correctly observes:

> "Agreements effected through reciprocal legislation may present opportunities for enhancement of state power

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constitute a court for the resolution of interstate disputes. Hence, if there were a disagreement over a compact that had been reached between two or more States, it could be adjudicated amicably before the Congress without risk of disrupting the Union. Treaties with foreign states, on the other hand, were much more dangerous and could embroil a State in serious obligations and even war. Of almost the same level of seriousness were alliances between the States, of potential long duration and obliging one State to treat two sister States in different fashion. For these reasons, prior approval by the Congress was required.

As Madison's commentary quoted in the text indicates, there was dissatisfaction with the way in which the Articles of Confederation provided for interstate compacts. The Constitution adopted an absolute prohibition against treaties, alliances, or confederations by the States; and imposed the requirement of congressional approval for "any Agreement or Compact with another State, or with a foreign Power." U. S. Const., Art. I, § 10.

[4] See *infra*, at 493–496.

> at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.' . . . The Clause reaches both 'agreements' and 'compacts,' the formal as well as the informal. The relevant inquiry must be one of impact on our federal structure." *Ante*, at 470–471 (footnotes omitted).
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> "Appellants further urge that the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy. We agree." *Ante*, at 472.

This is an apt recognition of the important distinction between the Compact Clause and the Commerce Clause. States may legislate in interstate commerce until an *actual* impact upon federal supremacy occurs. For individual States, the harm of *potential* impact is insufficiently upsetting to require prior congressional approval. For States acting in concert, however, whether through informal agreement, reciprocal legislation, or formal compact, "potential . . . impact upon federal supremacy" is enough to invoke the requirement of congressional approval.[5]

To this point, my views do not diverge from those of the majority as I understand them. But we do differ markedly in the application of those views to the Multistate Tax Compact.

II

Congressional consent to an interstate compact may be expressed in several ways. In the leading case of *Virginia* v. *Tennessee*, 148 U. S. 503 (1893), congressional consent to a compact setting a boundary was inferred from years of acqui-

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[5] The frequent circumstance of *potential* impact would make that standard unworkable in the Commerce Clause context since the result is pre-emption of state effort; but where the result is merely the requirement that Congress be consulted about the State's effort, as is the case with the Compact Clause, the application of that standard is not nearly so obstructive.

escence to that line by the Congress in delimiting federal judicial and electoral districts. *Id.*, at 522. Congressional consent may also be given in advance of the adoption of any specific compacts, by general consent resolutions, as was the case for the highway safety compacts, 72 Stat. 635, and the Crime Control Compact Consent Act of 1934, ch. 406, 48 Stat. 909.

Congress does not pass upon a submitted compact in the manner of a court of law deciding a question of constitutionality. Rather, the requirement that Congress approve a compact is to obtain its political judgment: [6] Is the agreement likely to interfere with federal activity in the area, is it likely to disadvantage other States to an important extent, is it a matter that would better be left untouched by state and federal regulation? [7] It comports with the purpose of seeking the political consent Congress affords that such consent may be expressed in ways as informal as tacit recognition [8] or prior approval, that Congress be permitted to attach condi-

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[6] See n. 3, *supra*.

[7] The pioneer article in the compact literature, Frankfurter & Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685 (1925), recognized the preferability of compacts to litigation in light of the political factors that could be balanced in the process of submitting and approving a compact. See *id.*, at 696, 706–707. This Court has also observed the peculiar amenability of some problems to settlement by compact rather than litigation. See *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943). See also F. Zimmermann & M. Wendell, The Interstate Compact Since 1925, pp. 102–103 (1951).

[8] A statute-of-limitations type of approach to the necessary duration of congressional silence before consent may be inferred has been suggested by one commentator. Note, The Constitutionality of the Multistate Tax Compact, 29 Vand. L. Rev. 453, 460 (1976). The National Association of Attorneys General has also declared its support for the use of informal procedures. F. Zimmermann & M. Wendell, The Law and Use of Interstate Compacts 25 (1961).

tions upon its consent,[9] and that congressional approval be a continuing requirement.[10]

In the present case, it would not be possible to infer approval from the congressional reaction to the Multistate Tax Compact. Indeed, the history of the Congress and the Compact is a chronicle of jealous attempts of one to close out the efforts of the other.[11]

On the congressional side of this long-lived battle, bills to approve the Compact have been introduced 12 separate times,[12] but all have faltered before arriving at a vote. Congress took the first step in the field of interstate tax apportionment with Pub. L. No. 86–272, 73 Stat. 555, passed the same year that this Court's opinion in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959),

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[9] In *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 27 (1951), this Court commented favorably on the provisions of the Compact involved which allowed continuing participation by the Federal Government through the President's power to designate members of the supervisory commission. The Port of New York Authority Compacts of 1921 and 1922 were among the first to provide for direct continuing supervisory authority by Congress. See Celler, Congress, Compacts, and Interstate Authorities, 26 Law & Contemp. Prob. 682, 688 (1961) (hereinafter Celler). It has been suggested that the imposition of conditions and the continuing nature of Congress' supervision are perceived as drawbacks by compacting States, and have led to a hesitancy to submit interstate agreements to Congress. See Note, *supra*, n. 8, at 461.

[10] This Court has held that Congress must possess the continuing power to reconsider terms approved in compacts, lest "[C]ongress and two States . . . possess the power to modify and alter the [C]onstitution itself." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 433 (1856). See also Celler 685, and authorities cited therein.

[11] An excellent summary of the several battles in this war is recounted in Hellerstein, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand. L. Rev. 335, 339–342 (1976). See also Sharpe, State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity, 11 Colum. J. L. & Soc. Prob. 231, 240–244 (1975) (hereinafter Sharpe).

[12] See *ante*, at 458 n. 8.

approved state taxation of reasonably identified multistate corporate income. A special subcommittee (the Willis Committee) was established which reported five years later with specific recommendations for federal statutory solution to the interstate allocation problem. In the Multistate Tax Commission's own words:

> "The origin and history of the Multistate Tax Compact are intimately related and bound up with the history of the states' struggle to save their fiscal and political independence from encroachments of certain federal legislation introduced in [C]ongress during the past three years. These were the Interstate Taxation Acts, better known as the Willis Bills." [13]

A special meeting of the National Association of Tax Administrators was called in January 1966; that gathering was the genesis of the Multistate Tax Compact. Over the course of 11 years, numerous bills have been introduced in the Congress as successors to the original Willis Bills, but none has ever become law.[14]

For its part, the Multistate Tax Commission has made no attempt to disguise its purpose. In its First Annual Report, the Commission spoke proudly of "bottling up the Willis Bill [alternative federal legislation] for an extended period," but warned that "it cannot be said that the threat of coercive, restrictive federal legislation is gone." 1 Multistate Tax Commission Ann. Rep. 10 (1968). In the most recent annual report, the tone has not changed. The Commission lists as one of its "major goals" the desire to "guard against restrictive federal legislation and other federal action which impinges upon the ability of state tax administrators to carry out the laws of their states effectively." 9 Multistate Tax Commission Ann. Rep. 1 (1976). The same report pledged continued

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[13] 1 Multistate Tax Commission Ann. Rep. 1 (1968).

[14] See *ante*, at 456 n. 4.

opposition to specific bills introduced in Congress restricting the States' utilization of the unitary-business concept and providing alternatives to the Compact's recommended method of apportioning multistate corporate earnings to the various States.[15] Even more importantly, the Commission denounced the tax treaty already signed with Great Britain (though not yet ratified),[16] for its prohibition of the unitary-business concept, the practice whereby a State combines for tax purposes the incomes from several related companies belonging to a single parent, even when the business carried on in a particular State is conducted by only one of the related companies. The President has negotiated this treaty in the diplomatic interest of the United States; but acting together through their joint agency, the Multistate Tax Commission, the Compact States are opposing its ratification. Of course, the Compact States have every right, in their own interest, to petition the branches of the Federal Government. Still, it cannot be disputed that the action of over 20 States, speaking through a single, established authority, carries an influence far stronger than would 20 separate voices.

A hostile stalemate characterizes the present position of the parties: the Multistate Tax Compact States opposing the Federal Congress and, since the proposed new tax treaty, the Federal Executive as well. No one could view this history and conclude that the Congress has acquiesced in the Multistate Tax Compact.

But more is demonstrated by this long dispute underlying the present case: Not only has Congress failed to acquiesce in the Multistate Tax Compact, but both Congress and the Executive have clearly demonstrated that there is a federal interest in the rules for apportioning multistate and multinational income. The Executive cannot constitutionally express his federal sovereign interest in the matter any more

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[15] See also 7 Multistate Tax Commission Ann. Rep. 3 (1974).

[16] See *ante*, at 476 n. 29.

unambiguously. He has negotiated a treaty with a foreign power and submitted that treaty to the Senate. As for the Congress, its federal sovereign interest in the topic was early established in Pub. L. No. 86–272. While the following years have produced no new legislation, the activity over the Willis Report, the Willis Bills, the successor bills, and the dozen shelvings of compact ratification bills establish at the very least that the Congress believes a federal interest is involved.[17] That a *potential* impact on federal concerns is at stake is indisputable.

It might be argued that Congress could more clearly have expressed its federal interest by passing a statute pre-empting the field, possibly in the form of an alternative apportionment formula. To hold Congress to the necessity of such action, however, accords no force to the Compact Clause independent of the Commerce Clause, as explained above. If the way to show a "*potential* federal interest" requires an exercise of the actual federal commerce power, then the purposes of the Compact Clause, and the Framers' deep-seated and special fear of agreements between States, would be accorded absolutely no respect.

III

Virginia v. *Tennessee*[18] quite clearly holds that not all agreements and compacts must be submitted to the Congress. The majority's phraseology of the test as "potential impact upon federal supremacy" incorporates the *Virginia* v. *Tennessee* standard. Nor do I disagree that many interstate agreements are legally effective without congressional consent. "Potential impact upon federal supremacy" requires some demonstration of a federal interest in the matter under consideration, and a threat to that interest. In very few cases,

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[17] For contrasting examples, where Congress perceived no federal interest, see Zimmermann & Wendell, *supra*, n. 8, at 21.

[18] See also *Wharton* v. *Wise*, 153 U. S. 155 (1894), applying the *Virginia* v. *Tennessee* dicta.

short of a direct conflict, will the record of congressional and executive action demonstrate as clearly as the record in the present case that the Federal Government considers itself to have a valid interest in the subject matter. Examples of compacts over which no federal concern was inferable have already been suggested.[19]

It seems to me, however, that even if a realistic potential impact on federal supremacy failed to materialize at one historic moment, that should not mean that an interstate compact or agreement is forever immune from congressional disapproval on an absolute or conditional basis. Yet the majority's approach appears to be that, because the instant agreement is, in the majority's view, initially without the Clause, it will *never* require congressional approval. The majority would approve this Compact without congressional ratification purely on the basis of its form: that no power is conferred upon the Multistate Tax Commission that could not be independently exercised by a member State. Such a view pretermits the possibility of requiring congressional approval in the future should circumstances later present even more clearly a potential federal interest, so long as the form of the Compact has not changed. That consequence fails to provide the ongoing congressional oversight that is part of the Compact Clause's protections.[20]

IV

For appellants' many suggestions of extraordinary authority wielded by the Multistate Tax Commission, the majority has but one repeated answer: that each member State is free

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[19] See *ante*, at 471–472, n. 24 (discussion of Interstate Compact to Conserve Oil and Gas).

[20] See n. 10, *supra*. Frankfurter and Landis found great value in interstate compacts because of their "[c]ontinuous and creative administration." See Frankfurter & Landis, *supra*, n. 7, at 707. By excluding Congress from the administration of the Multistate Tax Compact, the majority opinion restricts this facet of the Compact's attractiveness.

to adopt the procedures in question just as it could as if the Compact did not exist.

This cannot be an adequate answer even for the majority, which holds that "[a]greements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.'" *Ante*, at 470 (footnote omitted). Reciprocal legislation is adopted by each State independently, yet derives its force from the knowledge that other States are acting in identical fashion. In recognizing Compact Clause concerns even in reciprocal legislation, the majority correctly lays the premise that the absence of an autonomous authority would not be controlling.

So here, that the Compact States act in concerted fashion to foreclose federal law and treaties on apportionment of income, multistate audits, and unitary-business concepts [21] tells us at the least that a potential impact on federal supremacy exists. No realistic view of that impact could maintain that it is no greater than if individual States, acting purely spontaneously and without concert, had taken the same steps. It is pure fantasy to suggest that 21 States could conceivably have arrived independently at identical regulations for apportioning income, reciprocal subpoena powers, and identical interstate audits of multinational corporations, in the absence of some agreement among them.

Further, it is not clear upon reading the majority's opinion that appellants' suggestions of actual synergistic powers in the Multistate Tax Commission have been adequately answered.

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[21] For a detailed analysis of the complex taxation issues underlying each of these terms, see Carlson, State Taxation of Corporate Income from Foreign Sources, Department of Treasury Tax Policy Research Study Number Three, Essays in International Taxation: 1976, pp. 231, 235–252. For a thorough treatment of the income-allocation problem in the multinational setting, see Note, Multinational Corporations and Income Allocation Under Section 482 of the Internal Revenue Code, 89 Harv. L. Rev. 1202 (1976).

The Commission does have some life of its own. Under Art. VIII, providing for interstate audits, the Commission is given authority to offer to conduct audits even if no State has made a request.

> "If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the Commission." Multistate Tax Compact, Art. VIII, § 5.

If not for the Commission's acting on its own, in the absence of a suggestion from any State, the audit would not come about, even if the States subsequently approve. That implies some effects can be achieved beyond what the individual States themselves would have achieved, since, by hypothesis, no State would have proposed the audit on its own.

Other troubling provisions are Art. III, § 1, requiring that all member States *must* allow taxpayers to apportion their income in accord with Art. IV (the substance of which is similar to the Uniform Division of Income for Tax Purposes Act); and Art. III, § 2, requiring that all member States *must* offer a short-form option for small-business income tax.[22] If Compact States have no choice in the matter, these sections unquestionably go beyond the mere advisory role in which the majority would cast the Multistate Commission.

On its face, the Compact also provides in Art. IX for compulsory arbitration of allocation disputes among the member States at the option of any taxpayer electing to apportion his

[22] There is some question as to whether this Article is as mandatory as its language suggests. Several States in the Compact do not provide the option, and several others have not adopted the requisite rates to accompany the option. See Sharpe 245 n. 55. However, most of the member States have complied.

income in accord with Art. IV. Although Art. IX is not now operative (it requires passage of a regulation by the Commission to revive the arbitration mechanism), it was in effect for two and a half years. This provision binds the member States' participation, even against their will in any particular case. In two final respects, the Compact also differs significantly from reciprocal legislation. The subpoena power which the Compact makes possible (auditors can obtain subpoenas in any one of the States which have adopted Art. VIII of the Compact) is far different from what would be accomplished through reciprocal laws, in that it places an unusual "all-or-nothing" pressure on the non-Compact States. The usual form of reciprocal law is a statute passed by State Y, saying that any other State which accords Y access to its courts for the enforcement of tax obligations likewise will have access to the courts of Y. This Compact says that an outsider State will obtain reciprocal subpoena powers only as part of a package of Art. VIII Compact States—its own courts must be opened to all these States, and in return it will obtain Compact-wide access for judicial process needed in its own tax enforcement.

Lastly, the very creation of the Compact sets it apart from separate state action. The Compact did not become effective in *any* of the ratifying States until at least seven States had adopted it. Thus, unlike reciprocal legislation, the Compact provided a means by which a State could *assure* itself that a certain number of other States would go along before committing itself to an apportionment formula.

V

One aspect of the *Virginia* v. *Tennessee* test for congressional approval of interstate compacts requires specific emphasis. The *Virginia* v. *Tennessee* opinion speaks of whether a combination tends "to the increase of political power in the States, which may encroach upon or interfere

with the just supremacy of the United States," 148 U. S., at 519, and later, whether a compact or agreement would "encroach or not upon the full and free exercise of Federal authority." *Id.*, at 520.

The majority properly notes that any agreement among the States will increase their power, and focuses on the critical question of whether such an increase will enhance "state power *quoad* the National Government." *Ante*, at 473. A proper understanding of what would encroach upon federal authority, however, must also incorporate encroachments on the authority and power of non-Compact States.

In *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 726 (1838), this Court held that the purpose of requiring the submission to Congress of a compact (in that case, regarding a boundary) between two States was "to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure." See also *Florida* v. *Georgia*, 17 How. 478, 494 (1855). There is no want of authority for the conclusion that encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority,[23]

[23] See, *e. g.*, *United States* v. *Tobin*, 195 F. Supp. 588, 606 (DC 1961); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 712 (1976); Sharpe 265–272 (specifically observing state complaints about the Multistate Tax Compact); Zimmermann & Wendell, *supra*, n. 8, at 23; Celler 684 (purpose of Compact Clause "'to prevent undue injury to the interests of noncompacting states,'" quoting *United States* v. *Tobin*, *supra*); and Frankfurter & Landis, *supra*, n. 7, at 694–695. The Frankfurter and Landis treatment is perhaps the clearest expression of how the protection of federal and noncompact state interests blend in the rationale for the Compact Clause:

"But the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance,

nor is that surprising in view of the Federal Government's pre-eminent purpose to protect the rights of one State against another. If the effect of a compact were to put non-compact States at a serious disadvantage, the federal interest would thereby be affected as well.

The majority appears to recognize that allegations of harmful impact on other States is a cognizable challenge to a compact. See *ante*, at 477–478, 462–463, n. 12. The response the majority opinion provides is by now a familiar one: "Each member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact did not exist." *Ante*, at 477–478. The criticism of this reasoning offered above, in the context of encroachment on federal power, is applicable here as well. Judging by effect, not form, it is obvious that non-Compact States can be placed at a competitive disadvantage by the Multistate Tax Compact.

One example is in the attraction of multistate corporations to locate within a certain State's borders. Before the Multistate Tax Compact, "nonbusiness" dividend income was most commonly allocated to the State where a corporation was domiciled.[24] Under the Compact's "advisory" regulations, this type of income is apportioned among the several States where the company conducts its business. Hence, a non-Compact State will run the risk of taxing a domiciliary multistate corporation on more than 100% of its nonbusiness income, unless, of course, the State agrees to follow the rule of the Compact. Another way to view the impact on a non-member State is that if it wished to attract a multistate

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or Confederation,' and what arrangements come within the permissive class of 'Agreement or Compact.' But even the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions." *Ibid.*

[24] See Sharpe 269.

corporation to become a domiciliary, it might offer not to tax nonbusiness income. But with such income being apportioned by several other States anyway, the lure of the domicile State's exemption is effectively dissipated.

None of these results is necessarily "bad." The only conclusion urged here is that the effect on non-Compact States be recognized as sufficiently serious that Congress should be consulted. As the constitutional arbiter of political differences between States, the Congress is the proper body to evaluate the extent of harm being imposed on non-Compact States, and to impose ameliorative restrictions as might be necessary.

The Compact Clause is an important, intended safeguard within our constitutional structure. It is functionally a conciliatory rather than a prohibitive clause. All it requires is that Congress review interstate agreements that are capable of affecting federal or other States' rights. In the Court's decision today, a highly complex multistate compact, detailed in structure and pervasive in its effect on the important area of interstate and international business taxation, has been legitimized without the consent of Congress. If the Multistate Tax Compact is not a compact within the meaning of Art. I, § 10, then I fear there is very little life remaining in that section of our Constitution.

I respectfully dissent.

Syllabus

ARIZONA ET AL. *v.* WASHINGTON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1168. Argued October 31, 1977—Decided February 21, 1978

After respondent was found guilty of murder, the Arizona trial court granted a new trial because the prosecution had withheld exculpatory evidence from the defense. At the beginning of the new trial, the trial judge, after extended argument, granted the prosecutor's motion for a mistrial predicated on improper and prejudicial comment during defense counsel's opening statement that evidence had been hidden from respondent at the first trial, but the judge did not expressly find that there was "manifest necessity" for a mistrial or expressly state that he had considered alternative solutions. The Arizona Supreme Court refused to review the mistrial ruling, and respondent sought a writ of habeas corpus in Federal District Court. While agreeing that defense counsel's opening statement was improper, that court held that respondent could not be placed in further jeopardy and granted the writ because the state trial judge had failed to find "manifest necessity" for a mistrial. The Court of Appeals affirmed. *Held:*

1. Although the extent of the possible juror bias cannot be measured and some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions, nevertheless the overriding interest in the evenhanded administration of justice requires that the highest degree of respect be accorded to the trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of defense counsel's opening statement. Pp. 503-514.

2. The record supports the conclusion that the trial judge exercised "sound discretion" in declaring a mistrial, it appearing that he acted responsibly and deliberately and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding, and therefore the mistrial order is supported by the "high degree" of necessity required in a case of this kind. Pp. 514-516.

3. Since the record provides sufficient justification for the trial judge's mistrial ruling, that ruling is not subject to collateral attack in a federal court simply because the judge failed to make an explicit finding of "manifest necessity" for a mistrial that would avoid a valid double jeopardy plea or to articulate on the record all the factors that informed the deliberate exercise of his discretion. Pp. 516-517.

546 F. 2d 829, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., concurred in the result. WHITE, J., filed a dissenting opinion, *post*, p. 517. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 519.

Stephen D. Neely argued the cause and filed a brief for petitioner.

Ed Bolding argued the cause for respondent. With him on the brief was *Frederick S. Klein*.

MR. JUSTICE STEVENS delivered the opinion of the Court.

An Arizona trial judge granted the prosecutor's motion for a mistrial predicated on improper and prejudicial comment during defense counsel's opening statement. In a subsequent habeas corpus proceeding, a Federal District Court held that the Double Jeopardy Clause protected the defendant from another trial. The Court of Appeals for the Ninth Circuit affirmed.[1] The questions presented are whether the record reflects the kind of "necessity" for the mistrial ruling that will avoid a valid plea of double jeopardy, and if so, whether the plea must nevertheless be allowed because the Arizona trial judge did not fully explain the reasons for his mistrial ruling.

I

In 1971 respondent was found guilty of murdering a hotel night clerk. In 1973, the Superior Court of Pima County, Ariz., ordered a new trial because the prosecutor had withheld exculpatory evidence from the defense. The Arizona Supreme Court affirmed the new trial order in an unpublished opinion.

Respondent's second trial began in January 1975. During the *voir dire* examination of prospective jurors, the prosecutor made reference to the fact that some of the witnesses whose testimony the jurors would hear had testified in proceedings

[1] 546 F. 2d 829 (1977). The order discharging respondent from custody has been stayed pending completion of appellate review.

four years earlier.[2] Defense counsel told the prospective jurors "that there was evidence hidden from [respondent] at the last trial." In his opening statement, he made this point more forcefully:

> "You will hear testimony that notwithstanding the fact that we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George saying the man was Spanish speaking, didn't give those statements at all, hid them.
>
> "You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case." App. 180–181, 184.

After opening statements were completed, the prosecutor moved for a mistrial. In colloquy during argument of the motion, the trial judge expressed the opinion that evidence concerning the reasons for the new trial, and specifically the ruling of the Arizona Supreme Court, was irrelevant to the issue of guilt or innocence and therefore inadmissible. Defense counsel asked for an opportunity "to find some law" that would support his belief that the Supreme Court opinion would be admissible.[3] After further argument, the judge stated that

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[2] The prosecutor's reference was in the context of asking the venire whether they would be able to credit the testimony of a witness if there were inconsistencies between his present testimony and that given in earlier proceedings.

[3] "THE COURT: I cannot conceive how the opinion of the Arizona Supreme Court in this case would be admissible on any basis whatsoever.

"MR. BOLDING: I'll really try to do some additional work, then your Honor, to try to find some law for it. I believe it would be admissible. It's corroborative of the testimony that the jury will hear.

"THE COURT: I'm afraid, and I don't know how we stop it, we're getting to the point where we're trying the County Attorney's office and

he would withhold ruling on the admissibility of the evidence and denied the motion for mistrial. Two witnesses then testified.

The following morning the prosecutor renewed his mistrial motion. Fortified by an evening's research, he argued that there was no theory on which the basis for the new trial ruling could be brought to the attention of the jury, that the prejudice to the jury could not be repaired by any cautionary instructions, and that a mistrial was a "manifest necessity." Defense counsel stated that he still was not prepared with authority supporting his belief that the Supreme Court opinion was admissible.[4] He argued that his comment was invited by the prosecutor's reference to the witnesses' earlier testimony

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the County Attorney's office, conduct, whatever it was in the last case, and I simply, I am not going to allow it if this trial goes on and I'm very sorely tempted to grant the State's motion at this time.

"MR. BOLDING: Well your Honor, that's—I will be—sorry if that happens and if the Court tells me now that I cannot examine any witness about that Supreme Court decision until I furnish you some law that says yes, that can come in, then I will abide by that decision, your Honor. I will be working on it and I would like to reserve my right to present that to the Court outside the hearing of the jury at another time. I just, I believe that it is, it's credible evidence. It's, thinking, you know, off the top of my head here, it's opinion evidence from experts. It's evidence that I believe is truly corroborative of the evidence that the jury will hear and I would certainly like to reserve my right to present some, if I can find you some written law, which would allow this type of testimony, your Honor, as evidence." App. 209–210.

Later, the trial judge expressed disagreement with defense counsel's argument that evidence of prosecutorial misconduct could be admitted on an impeachment theory: "I don't think you're entitled to prove all this misconduct if such is the case, to impeach every witness, and I think that's what you're saying to me." *Id.*, at 217–218.

[4] "I have not worked on that because I'm not at that stage yet where I think it's necessary to bring that into evidence." *Id.*, at 243. Apparently when counsel made his opening statement, he was not prepared to support the admissibility of the testimony with legal authority.

and that any prejudice could be avoided by curative instructions. During the extended argument, the trial judge expressed his concern about the possibility that an erroneous mistrial ruling would preclude another trial.[5]

Ultimately the trial judge granted the motion, stating that his ruling was based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion. The trial judge did not expressly find that there was "manifest necessity" for a mistrial; nor did he expressly state that he had considered alternative solutions and concluded that none would be adequate. The Arizona Supreme Court refused to review the mistrial ruling.[6]

Respondent then filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, alleging that another trial would violate the Double Jeopardy Clause. After reviewing the transcript of the state proceeding, and hearing the arguments of counsel, the Federal District Judge noted that the Arizona trial judge had not canvassed on the record the possibility of alternatives to a mistrial and expressed the view that before granting a mistrial motion the judge was required "to find that manifest necessity exists for the granting of it." [7] Because the record contained no such finding, and because the federal judge was not prepared to

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[5] "[Prosecutor:] The only cure, your Honor, is a mistrial. The State is well aware that if the position I'm taking is wrong, if a mistrial is not proper, that man walks, I know that.

"THE COURT: And I expressed my concern about that, Mr. Butler." *Id.*, at 253.

[6] Respondent filed both a "special action"—a proceeding in the nature of a common-law writ of mandamus or prohibition, see 17A Ariz. Rev. Stat. Ann., Rules of Procedure for Special Actions, Rule 1 (1973)—and a petition for a writ of habeas corpus. Respondent also moved in the trial court to dismiss or quash the information. Petitioner does not raise any question about the adequacy of respondent's exhaustion of available state remedies.

[7] App. 129.

make such a finding himself, he granted the writ.[8] He agreed with the State, however, that defense counsel's opening statement had been improper.

The Ninth Circuit also characterized the opening statement as improper, but affirmed because, absent a finding of manifest necessity or an explicit consideration of alternatives,[9] the court was unwilling to infer that the jury was prevented from arriving at a fair and impartial verdict.[10] In a concurring opinion, two judges noted that, while the question of manifest necessity had been argued, most of the argument on the mistrial motion had concerned the question whether the opening statement was improper. They concluded that, "absent findings that manifest necessity existed, it . . . [was] quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established

[8] The District Court indicated that a simple statement by the trial judge to the effect that there was "manifest necessity" for the mistrial would have sufficed to defeat the double jeopardy claim. *Id.*, at 130–140.

[9] In his opinion for the Court of Appeals, Judge Kilkenny stated:

"In the absence of clear abuse, we are normally inclined to uphold discretionary orders of this nature. In the usual case, the trial judge has observed the complained-of event, heard counsel, and made specific findings. Under such circumstances, a mistrial declaration accompanied by a finding that the jury could no longer render an impartial verdict would not be lightly set aside." 546 F. 2d, at 832.

The importance of the absence of express findings or reasons to the decision below seems apparent. The Arizona trial judge "observed the complained-of event" and patiently "heard counsel." Had he taken the additional step of making an express finding of "manifest necessity," it appears that Judge Kilkenny would have reviewed the mistrial ruling under a less exacting abuse-of-discretion standard.

[10] In its opinion as originally released, the court stated: "[W]e decline to imply from this impropriety that the jury was completely prevented from arriving at a fair and impartial verdict." App. 29–30. The court subsequently amended its opinion to delete the word "completely" from that sentence. As originally written, the opinion implied that the probability of jury prejudice would not be a sufficient ground for mistrial; only the certainty of prejudice would suffice.

without reaching the question whether there could, nevertheless, be a fair trial." 546 F. 2d, at 833.

We are persuaded that the Court of Appeals applied an inappropriate standard of review to mistrial rulings of this kind, and attached undue significance to the form of the ruling. We therefore reverse.

II

A State may not put a defendant in jeopardy twice for the same offense. *Benton* v. *Maryland*, 395 U. S. 784. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." See *Fong Foo* v. *United States*, 369 U. S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.

Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." [11] The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden

[11] This description of the right, which was quoted by Mr. Justice Harlan in his plurality opinion in *United States* v. *Jorn*, 400 U. S. 470, 484, and by the Court in *Illinois* v. *Somerville*, 410 U. S. 458, 466, was formulated by Mr. Justice Black in his opinion for the Court in *Wade* v. *Hunter*, 336 U. S. 684, 689. His complete sentence identifies that right as sometimes subordinate to a larger interest in having the trial end in a just judgment: "What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Ibid.*

on the accused,[12] prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing,[13] and may even enhance the risk that an innocent defendant may be convicted.[14] The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.[15]

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[12] "Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action." *United States* v. *Jorn, supra,* at 483.

[13] As Mr. Justice Black stated in *Green* v. *United States,* 355 U. S. 184, 187–188:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, *thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,* as well as enhancing the possibility that even though innocent he may be found guilty." (Emphasis added.)

[14] In *Carsey* v. *United States,* 129 U. S. App. D. C. 205, 208-209, 392 F. 2d 810, 813–814 (1967), Judge Leventhal described how subtle changes in the State's testimony, initially favorable to the defendant, may occur during the course of successive prosecutions:

"[T]he Government witnesses came to drop from their testimony impressions favorable to defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an unfriendly word spoken, ended up by saying for the first time in four trials that the words between them had been 'firm,' and possibly harsh and 'cross.'

"We also note that the police officer who readily acquiesced in the two 'hung jury' trials that appellant was 'hysterical,' later withheld that characterization. This shift, though less dramatic, was by no means inconsequential in view of the significance of appellant's condition at the time he made a statement inconsistent with what he later told another officer."

See also n. 13, *supra.*

[15] As the Court stated in *Illinois* v. *Somerville, supra,* at 471:

"The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury

Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.[16] Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden.[17] For that reason

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first impaneled is itself a weighty one. . . . Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration."

[16] In his opinion announcing the Court's judgment in *United States* v. *Jorn*, *supra*, at 479–480, Mr. Justice Harlan explained why a rigid application of the "particular tribunal" principle is unacceptable:

"[A] criminal trial is, even in the best of circumstances, a complicated affair to manage. . . . [It is] readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide."

[17] Whether the phrase "manifest necessity," "evident necessity," see *Winsor* v. *The Queen*, L. R. 1 Q. B. 289, 305 (1866) (Cockburn, C. J.), or

Mr. Justice Story's classic formulation of the test [18] has been quoted over and over again to provide guidance in the decision of a wide variety of cases.[19] Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.[20] Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.[21]

"imperious necessity," see *Downum* v. *United States*, 372 U. S. 734, 736, is used, the meaning is apparently the same.

[18] "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . . But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *United States* v. *Perez*, 9 Wheat. 579, 580.

[19] See, *e. g.*, *Wade* v. *Hunter*, 336 U. S. 684 (court-martial proceeding terminated because of military necessity); *Simmons* v. *United States*, 142 U. S. 148 (possible juror bias); *United States* v. *Perez*, *supra* (hung jury).

[20] As the Court noted in *Illinois* v. *Somerville*, 410 U. S., at 462, the *Perez* "formulation, consistently adhered to . . . in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial."

[21] The English courts have long recognized the truth of this proposition in the "hung jury" context:

"This rule if taken literally seems to command the confinement of the jury till death if they do not agree, and to avoid any such consequence an

The question whether that "high degree" has been reached is answered more easily in some kinds of cases than in others. At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict,[22] the prohibition against double jeop-

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exception was introduced in practice which Blackstone has described by the words 'except in case of evident necessity.'

"But the exception so expressed has given rise to further doubts, because necessity is an equivocal word, meaning either irresistible compulsion or a high degree of need. Those who have been interested in objecting to a discharge of a jury before verdict, have disputed whether the discharge was necessary in the stricter sense of the word. The same dispute about the meaning of the word necessity in the exception to this rule is the source of the main questions raised upon this writ of error, and they are in substance answered when we decide on the meaning of that word in the exception to this rule, and apply that meaning to the facts appearing on this record. We assume it to be clear that the discharge of the jury before verdict may be lawful at some time and under some circumstances. Then with reference to the facts on this record, we hold that the judge at the first trial had by law power to discharge the jury before verdict, when a high degree of need for such discharge was made evident to his mind from the facts which he had ascertained. We cannot define the degree of need without some standard for comparison; we cannot approach nearer to precision than by describing the degree as a high degree such as in the wider sense of the word might be denoted by necessity." *Winsor* v. *The Queen, supra,* at 390, 394.

[22] *E. g., Whitebread,* 7 How. St. Tr. 311 (1679). See also *The Queen* v. *Charlesworth,* 1 B. & S. 460, 500, 121 Eng. Rep. 786, 801 (Q. B. 1861); Friedland, Double Jeopardy 13–14, 21–25 (1969); Sigler, Double Jeopardy 87 (1969); Douglas, An Almanac of Liberty 143 (1954). In reaction, the rule developed in England that the judge should not discharge the jury prior to verdict except in cases of "evident necessity." *Winsor* v. *The Queen, supra,* at 304–305. However, if, for example, the judge discharged the jury because a key witness for the Crown refused to testify, see *The Queen* v. *Charlesworth, supra,* the accused could nevertheless be retried because jeopardy had not attached under the English rule. *Winsor* v.

ardy as it evolved in this country was plainly intended to condemn this "abhorrent" practice.[23] As this Court noted in *United States* v. *Dinitz*, 424 U. S. 600, 611:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor' . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."

Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence,[24] or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.[25]

The Queen, *supra*, at 390; *The Queen* v. *Charlesworth*, *supra*; Friedland, *supra*, at 22–23.

[23] "[I]n the reigns of the latter sovereigns of the Stuart family, a different rule prevailed, that a jury in such case might be discharged for the purpose of having better evidence against him at a future day; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country. In the time of James II, and since the Revolution, this doctrine came under examination, and the rule as laid down by my Lord Coke was revived . . . ." *State* v. *Garrigues*, 2 N. C. 188, 189 (1795).

[24] If, for example, a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason, a second prosecution is barred. *Downum* v. *United States*, 372 U. S. 734. The prohibition against double jeopardy unquestionably "forbids the prosecutor to use the first proceeding as a trial run of his case." Note, Twice in Jeopardy, 75 Yale L. J. 262, 287–288 (1965).

[25] As Mr. Justice Douglas noted in *Downum* v. *United States*, *supra*, at 736:

"Harassment of an accused by successive prosecutions or declaration of

At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial.[26] The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate

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a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches."

Yet, as Mr. Justice Douglas further noted, "those extreme cases do not mark the limits of the guarantee." *Ibid.* The "particular tribunal" principle is implicated whenever a mistrial is declared over the defendant's objection and without regard to the presence or absence of governmental overreaching. If the "right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury." *United States* v. *Jorn*, 400 U. S., at 485. See discussion in Part III, *infra*.

[26] *Downum* v. *United States*, *supra*, at 735–736.

court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments.[27] The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.[28]

We are persuaded that, along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny, the difficulty which led to the mistrial in this case also falls in an area where the trial judge's determination is entitled to special respect.

In this case the trial judge ordered a mistrial because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury. Although respond-

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[27] This public interest in fair judgments is not of recent origin:

"We do take upon ourselves, without the consent of the parties . . . , to discharge the jury when we are satisfied that they have fully considered the case and cannot agree; and I hope no Judge will shrink from taking that course; for, if a jury cannot agree, we ought not to coerce them by personal suffering, nor ought we to expose parties to the danger of a verdict which is not the result of conviction in the minds of the jury, but produced by suffering of mind or body." *The Queen* v. *Charlesworth*, 1 B. & S., at 503–504, 121 Eng. Rep., at 802.

[28] *United States* v. *Perez*, 9 Wheat. 579; *Logan* v. *United States*, 144 U. S. 263; *Moss* v. *Glenn*, 189 U. S. 506; *Keerl* v. *Montana*, 213 U. S. 135; *Dreyer* v. *Illinois*, 187 U. S. 71. It should be noted, however, that the rationale for this deference in the "hung" jury situation is that the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate. If the record reveals that the trial judge has failed to exercise the "sound discretion" entrusted to him, the reason for such deference by an appellate court disappears. Thus, if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate. Cf. *United States* v. *Gordy*, 526 F. 2d 631 (CA5 1976).

ent insists that evidence of prosecutorial misconduct [29] was admissible as a matter of Arizona law, and therefore that the opening statement was proper, we regard this issue as foreclosed by respondent's failure to proffer any Arizona precedent supportive of his contention [30] and by the state court's interpretation of its own law, buttressed by the consistent opinion of the Federal District Court and the Court of Appeals. Cf. *Bishop* v. *Wood*, 426 U. S. 341, 346–347. We therefore start from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury.

We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

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[29] Of course, we express no opinion regarding whether the failure of the prosecutor to hand over *Brady* (*Brady* v. *Maryland*, 373 U. S. 83) material to the defense at the first trial was deliberate or inadvertent. The decision of the Arizona Supreme Court granting respondent a new trial, in our opinion, does not specifically address the matter. We simply accept for the purpose of analysis respondent's characterization of the failure to disclose the evidence as misconduct.

[30] Respondent relies on *State* v. *Burruell*, 98 Ariz. 37, 401 P. 2d 733 (1965), as the Arizona decision most supportive of admissibility. Tr. of Oral Arg. 30. This case, however, simply stands for the well-accepted proposition that a witness may be impeached with evidence tending to show that he has an interest in giving testimony favorable to the State and against the defendant. It undoubtedly would have been proper for defense counsel to use the statements suppressed at the first trial during the second trial, but there is nothing in *Burruell* which would suggest that the fact of the suppression would have been admissible for any purpose at the second trial.

The consistent course of decision in this Court in cases involving possible juror bias supports this conclusion. *Simmons* v. *United States*, 142 U. S. 148, involved the possibility of bias caused by a newspaper story describing a letter written by defense counsel denying a charge by a third party that one of the jurors was acquainted with the defendant. Without determining the truth or falsity of the charge, and without examining the jurors to ascertain what influence the story had upon them, the trial judge declared a mistrial because he considered it " 'impossible that in the future consideration of this case by the jury there can be that true independence and freedom of action on the part of each juror which is necessary to a fair trial of the accused.' " *Id.*, at 150. This Court affirmed, holding that the judge was justified in concluding that the publication of the letter had made it impossible for the jury "to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties." *Id.*, at 155.

In *Thompson* v. *United States*, 155 U. S. 271, 279, the Court concluded that a mistrial was required when it was revealed that one of the trial jurors had served on the grand jury that indicted the defendant. Since it is possible that the grand jury had heard no more evidence—and perhaps even less—than was presented at the trial, and since the juror in question may have had no actual bias against the defendant, the record did not demonstrate that the mistrial was strictly "necessary." There can be no doubt, however, about the validity of the conclusion that the possibility of bias justified the mistrial.

An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation,[31] that the entire panel may be tainted. The trial judge, of

[31] For example, if there is a suggestion of individual juror bias, it may be possible to replace that juror with an alternate.

course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial as he did in *United States* v. *Dinitz*, 424 U. S. 600. Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct." *Id.*, at 612.[32]

There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias.[33] He has seen and

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[32] In his concurring opinion in *Dinitz*, MR. CHIEF JUSTICE BURGER emphasized the narrow purpose and scope of a legitimate opening statement:

"It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." 424 U. S., at 612.

Our identification of this reason for according deference to the trial judge in juror bias cases generally is not intended as a comment upon the conduct of defense counsel in this case.

[33] These considerations must be at least as weighty where a federal court, in considering a state prisoner's collateral challenge to his conviction on

heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. See *Wade* v. *Hunter*, 336 U. S. 684, 687.

III

Our conclusion that a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference does not, of course, end the inquiry. As noted earlier, a constitutionally protected interest is inevitably affected by any mistrial decision. The trial judge, therefore, "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn*, 400 U. S., at 486 (Harlan, J.). In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised "sound discretion" in declaring a mistrial.

Thus, if a trial judge acts irrationally or irresponsibly, cf. *United States* v. *Jorn, supra;* see *Illinois* v. *Somerville*, 410 U. S., at 469, his action cannot be condoned. But our review of this record indicates that this was not such a case.[34] Defense

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the ground that it violated the Double Jeopardy Clause, reviews the determination of a state trial judge as to juror bias.

[34] In this case, defense counsel made brief reference during *voir dire* to the fact that evidence was withheld from the defense at the previous trial. Later in the *voir dire* the prosecutor expressed his concern to the trial judge that if the jurors were aware of the fact that respondent obtained a new trial because the prosecution failed to produce some evidence, they might be prejudiced against the State. In response to the

counsel aired improper and highly prejudicial evidence before the jury, the possible impact of which the trial judge was in the best position to assess. The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain

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prosecutor's concern, the trial judge conducted an inquiry into whether the jurors knew the reason for the new trial. The inquiry revealed that the jurors were not then aware of the reason for the new trial. During the opening statements which followed, however, defense counsel did not leave the matter to the jurors' conjecture; instead, he explicitly stated that they would hear testimony showing that the Supreme Court of Arizona granted respondent a new trial because the prosecutor deliberately withheld exculpatory evidence from the defense. Following completion of opening argument, the prosecutor moved for a mistrial.

During argument on the prosecutor's motion, defense counsel insisted that evidence of prosecutorial misconduct in a prior proceeding was admissible for impeachment purposes; although he could offer no authority to support this novel proposition, he indicated to the judge that he would appreciate an opportunity to "find . . . some written law, which would allow this type of testimony . . . as evidence." *Supra*, at 500 n. 3. While the trial judge remarked that he could conceive of no basis for the admission of such evidence and that he was tempted to grant the prosecutor's request immediately because of defense counsel's injection of the prosecutorial misconduct issue into the trial, *supra*, at 499–500, n. 3, he did not act precipitately. Rather, proceeding with caution and giving defense counsel the benefit of the doubt, App. 223, the trial judge reserved ruling on the admissibility question and at first denied the mistrial motion. In avoiding a hasty decision despite his conviction that the evidence was improper, the trial judge was plainly acting out of concern for the double jeopardy interests implicated by an improvident mistrial. *Id.*, at 225, 253.

The following day the prosecutor renewed his motion. The trial judge heard extensive argument from both sides regarding both the propriety of defense counsel's opening statement and the need for a mistrial. Defense counsel contended that any prejudice which might have resulted from the references to prosecutorial misconduct could be cured by cautionary instructions; the prosecutor argued that such an alternative would be inadequate to remove the risk of taint.

their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. Since he exercised "sound discretion" in handling the sensitive problem of possible juror bias created by the improper comment of defense counsel, the mistrial order is supported by the "high degree" of necessity which is required in a case of this kind.[35] Neither party has a right to have his case decided by a jury which may be tainted by bias;[36] in these circumstances, "the public's interest in fair trials designed to end in just judgements"[37] must prevail over the defendant's "valued right" to have his trial concluded before the first jury impaneled.

IV

One final matter requires consideration. The absence of an explicit finding of "manifest necessity" appears to have been determinative for the District Court and may have been so for the Court of Appeals. If those courts regarded that omission as critical,[38] they required too much. Since the record provides

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[35] Two considerations, while not determinative, add support to this conclusion. First, crowded calendars throughout the Nation impose a constant pressure on our judges to finish the business at hand. Generally, they have an interest in having the trial completed as promptly as possible, an interest which frequently parallels the constitutionally protected interest of the accused in having the trial concluded by a particular tribunal. Second, respondent does not attempt to demonstrate specific prejudice from the mistrial ruling, other than the harm which always accompanies retrial. Cf. *McNeal* v. *Hollowell*, 481 F. 2d 1145, 1147 (CA5 1973).

[36] In *United States* v. *Morris*, 26 F. Cas. 1323 (No. 15,815) (CC Mass. 1851), Mr. Justice Curtis held that even after the jury had been sworn, it was not too late to challenge a juror for bias. He pointed out that neither party "can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case." *Id.*, at 1328.

[37] *Wade* v. *Hunter*, 336 U. S., at 689.

[38] See nn. 7–10 and accompanying text, *supra*.

sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.

Review of any trial court decision is, of course, facilitated by findings and by an explanation of the reasons supporting the decision. No matter how desirable such procedural assistance may be, it is not constitutionally mandated in a case such as this. Cf. *Cupp* v. *Naughten*, 414 U. S. 141, 146. The basis for the trial judge's mistrial order is adequately disclosed by the record, which includes the extensive argument of counsel prior to the judge's ruling. The state trial judge's mistrial declaration is not subject to collateral attack in a federal court simply because he failed to find "manifest necessity" in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion.[39]

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN concurs in the result.

MR. JUSTICE WHITE, dissenting.

I cannot agree with the Court of Appeals that the failure of a state trial judge to express the legal standard under which

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[39] The Court of Appeals was concerned that the trial judge may have granted the State's mistrial motion because the comments of defense counsel were improper without considering the possible impact of those comments on the impartiality of the jurors. We think this concern was unwarranted. Shortly after defense counsel made his first, brief reference to the withholding of evidence in the earlier trial, the judge indicated his concern regarding the possible "poisoning of the panel." In addition, both sides argued the question of juror bias and offered their views on whether action short of a mistrial would suffice to eliminate the risk of taint. Finally, the trial judge indicated his awareness of the grave consequences of an erroneous mistrial ruling. We are unwilling to assume that a judge, who otherwise acted responsibly and deliberately, simply neglected to consider one of the central issues presented by the mistrial motion and argued by the parties when he made his ruling.

he has declared a mistrial is, in itself and without further examination of the record, sufficient reason to infer constitutional error foreclosing a second trial. The Court's opinion in *Townsend* v. *Sain*, 372 U. S. 293 (1963), is to the contrary. There, in the course of a full scale exposition of the proper approach to be followed by a federal court in determining whether a writ of habeas corpus should be issued on the petition of a state prisoner, the Court addressed the situation where the state trial judge, in making the challenged ruling, did not articulate the constitutional standard under which he acted. The Court concluded that "the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied." *Id.*, at 314–315. A silent record is not a sufficient basis for concluding that the state judge has committed constitutional error; the mere possibility of error is not enough to warrant habeas corpus relief.

The Court of Appeals, as well as the District Court, was therefore in error in granting relief without further examination of the record to determine whether the use of an incorrect legal standard was sufficiently indicated by something beyond mere silence and, if not, whether the declaration of a mistrial, which the Court of Appeals said it was "normally inclined to uphold," at least in the absence of "clear abuse of discretion," was constitutionally vulnerable. I would not, however, undertake an examination of the record here in the first instance. Rather, I would vacate the judgment of the Court of Appeals and direct that court to remand the case to the District Court to make the initial judgment, under the correct legal standard, as to whether the writ should issue.

This disagreement with the Court's disposition leads me to dissent.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that another trial of respondent, following a mistrial declared over his vehement objection, is not prohibited by the Double Jeopardy Clause. To reach this result, my Brethren accord a substantial degree of deference to a trial court finding that the Court simply assumes was made but that appears nowhere in the record. Because of the silence of the record on the crucial question whether there was "manifest necessity" for a mistrial, I believe that another trial of respondent would violate his constitutional right not to be twice put in jeopardy for the same offense. I therefore dissent.

My disagreement with the majority is a narrow one. I fully concur in its view that the constitutional protection of the Double Jeopardy Clause "embraces the defendant's 'valued right to have his trial completed by a particular tribunal,' " since a second prosecution inevitably "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Ante*, at 503–504 (footnotes omitted). For these reasons, I also agree that, where a mistrial is declared over a defendant's objections, a new trial is permissible only if the termination of the earlier trial was justified by a "manifest necessity" and that the prosecution must shoulder the "heavy" burden of demonstrating such a "high degree" of necessity. *Ante*, at 505–506. Nor do I quarrel with the proposition that reviewing courts must accord substantial deference to a trial judge's determination that the prejudicial impact of an improper opening statement is so

great as to leave no alternative but a mistrial to secure the ends of public justice. *Ante*, at 510, 513–514.[1]

Where I part ways from the Court is in its assumption that an "assessment of the prejudicial impact of improper argument," *ante*, at 514, sufficient to support the need for a mistrial, may be implied from this record. As the courts below found,[2] it is not apparent on the face of the record that termination of the trial was justified by a "manifest necessity" or was the only means by which the "ends of public justice" could be fulfilled, *United States* v. *Perez*, 9 Wheat. 579, 580 (1824).

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[1] This proposition is essentially unremarkable. It is a truism that findings of fact by the trial court may not be set aside on appeal unless "clearly erroneous," and that on review appropriate deference must be given to the trial court's opportunity to judge the credibility of the witnesses. See, *e. g.*, Fed. Rule Civ. Proc. 52 (a); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). While the determination that there is no alternative but a mistrial to cure prejudice created by an improper opening statement is in part one of law, in a case of this sort it is based primarily on a factual evaluation of the extent to which the particular jury has been prejudiced.

[2] Contrary to the majority's implication, *ante*, at 502 nn. 8–9, the courts below did not hold that the absence of express findings relating to the necessity for a mistrial was by itself dispositive. Rather, the rulings of the District Court and the Court of Appeals were based on their respective conclusions that on this record it could not independently be determined that "the jury was prevented from arriving at a fair and impartial verdict," and therefore that a finding of manifest necessity was not implicit in this record. 546 F. 2d 832; see App. 128–129 (District Court's view that any prejudice could have been cured by cautionary instruction).

Nor can I agree with the majority that the Court of Appeals applied an inappropriate standard of review. It expressly recognized that "[t]he power to discharge a jury . . . is discretionary with the trial court" and that, "[i]n the absence of clear abuse, we . . . normally . . . uphold discretionary orders of this nature." 546 F. 2d, at 832. But this is so, noted the court, where "[i]n the usual case, the trial judge has observed the complained-of event, heard counsel, and made specific findings. Under such circumstances, a mistrial declaration accompanied by a finding that the jury could no longer render an impartial verdict would not lightly be set aside." *Ibid.*

See also *ante*, at 511. Defense counsel's improper remarks occupied only one page of a lengthy opening statement. Despite the fact that the prosecutor had vigorously interrupted the opening statement at numerous points to assert various objections,[3] he made no objection to the remarks that formed the basis for the mistrial. If the argument of defense counsel had had a visibly obvious impact on the jurors when uttered, it is hard to believe that this prosecutor would have waited until after the opening statement was finished and the luncheon recess concluded before making his objection known.

Although from this distance and in the absence of express findings it is impossible to determine the precise extent to which defense counsel's remarks may have prejudiced the jury against the State, the circumstances set forth above suggest that any such prejudice may have been minimal and subject to cure through less drastic alternatives.[4] For example, the jury could have been instructed to disregard any mention of prior legal rulings as irrelevant to the issues at hand, and to consider as evidence only the testimony and exhibits admitted through witnesses on the stand.[5] Were there doubt

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[3] See App. 173, 176, 178, 182, 183.

[4] As is recognized by the majority in its search for an implied finding that the prejudice was sufficient to warrant a mistrial, mere error by either the prosecutor or the defense is insufficient by itself to provide the "high degree" of necessity, *ante*, at 506, required to permit a retrial following the grant of a mistrial over the defendant's objections. See *United States* v. *Dinitz*, 424 U. S. 600, 608 (1976), quoting *United States* v. *Jorn*, 400 U. S. 470, 484 (1971) (plurality opinion of Harlan, J.).

[5] I do not mean to suggest that curative instructions are always or even generally sufficient to cure prejudice resulting from evidentiary errors, see *Bruton* v. *United States*, 391 U. S. 123, 129 (1968), quoting *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949) (Jackson, J., concurring), particularly where the error is one by the prosecutor and must be shown to have been harmless beyond any reasonable doubt in order for the conviction to be sustained, see *Chapman* v. *California*, 386 U. S. 18, 21–24 (1967). However, it must be recognized that the cases are legion in which convictions have been upheld despite the jury's exposure to improper material

whether such instructions alone would suffice to cure the taint, the jury could have been questioned about the extent of any prejudice. Given the anticipated length of the trial (almost two weeks),[6] it is not unlikely that, had the jury been appropriately instructed when the court first found defense counsel to have erred in his opening statement, any prejudice would have dissipated before deliberations were to begin. For these reasons, it is impossible to conclude that a finding of necessity was implicit in the mere grant of the mistrial.[7]

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relating to the defendant's past conduct, often because curative instructions have been found sufficient to dispel any prejudice. See, *e. g.*, *United States* v. *Bloom*, 538 F. 2d 704, 710 (CA5 1976); *id.*, at 711 (Tuttle, J., concurring); *United States* v. *Plante*, 472 F. 2d 829, 831–832 (CA1), cert. denied, 411 U. S. 950 (1973); *United States* v. *Roland*, 449 F. 2d 1281 (CA5 1971); *Driver* v. *United States*, 441 F. 2d 276 (CA5 1971); *Beasley* v. *United States*, 94 U. S. App. D. C. 406, 218 F. 2d 366 (1954), cert. denied, 349 U. S. 907 (1955). See also *United States* v. *Hoffman*, 415 F. 2d 14, 21 (CA7), cert. denied, 396 U. S. 958 (1969) (prosecutor's closing argument referring to accused as "liar, crook, and wheeler and dealer" was improper but harmless error). If instructions may be found to have cured prosecutorial error relating to the defendant's past misconduct beyond a reasonable doubt, they ought surely to be considered in deciding whether to subject a defendant to a second trial because of defense error in referring to past misconduct by the prosecution.

[6] See Tr. of *Voir Dire* by Defendant's Counsel 22.

[7] In this respect, the instant case differs markedly from the situation in *Thompson* v. *United States*, 155 U. S. 271 (1894), discussed *ante*, at 512. There, upon discovery that one of the petit jurors had served on the grand jury indicting the defendant, the trial court immediately announced that, "[if it] is insisted on by the gentlemen, there is no way left but for the court to discharge the jury on that ground . . . ." Record in No. 637, O. T. 1893, p. 20. Defense counsel objected to the juror's participation, but also objected to a discharge of the jury, arguing that he was entitled to an acquittal once having been placed in jeopardy. The trial court was of the view, clearly correct, that had the juror remained on the panel despite counsel's objection any conviction would have been reversed. *Id.*, at 21–22. That being the case, the trial court held that the jury could be discharged and a new jury impaneled without violating the Double Jeopardy Clause. This Court affirmed.

As the majority concedes, *ante,* at 501, there was no express determination or evaluation by the trial court of the degree of prejudice caused by the improper remarks; nor was there any exploration of possible alternatives to the drastic solution of declaring a mistrial; nor, indeed, any express indication on the face of the record that the trial court was aware of the dictates of the *Perez* doctrine. Over the two days during which the mistrial motion was argued, the entire thrust of the trial court's questions and comments was to determine whether there was any legal basis for admitting into evidence the Arizona Supreme Court's ruling that the prosecution in an earlier trial had suppressed evidence exculpatory of respondent, to which ruling defense counsel had adverted in opening statement.[8] The tenor of the court's remarks throughout—including its statement in declaring the mistrial[9]—suggests that the only question considered was that of admissibility.[10]

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[8] Thus, while the trial court repeatedly challenged defense counsel on his theories for admissibility of the Arizona Supreme Court's ruling, see App. 204, 205, 209, 211, 217, 248, not once did the court refer to "manifest necessity"; question defense counsel as to the nature of any curative instructions that might be propounded; or otherwise indicate a consciousness that mere error on either side is insufficient to warrant the grant of a mistrial over defense objections, see n. 4, *supra.*

[9] "Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted." App. 271–272. As was noted in the Court of Appeals, the circumstances of the argument on the mistrial motion and the ruling itself make it "quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial." 546 F. 2d, at 833 (Merrill, J., concurring).

[10] The majority relies on three aspects of the record to support its conclusion that the trial court did make an evaluation of the prejudicial impact of counsel's remarks and of the need for a mistrial to correct the error. *Ante,* at 514–515, n. 34, 517 n. 39. The first is that the trial court was aware of the double jeopardy consequences of an improvidently granted mistrial, namely, that the defendant may not be tried again. While this

There is no doubt that the trial court's exploration of the evidentiary question was conscientious and deliberate. The majority infers from this care that the trial court must have been aware of the correct legal standard governing the permissibility of retrials following mistrials, and must impliedly, though not expressly, have made the requisite findings of necessity. The deliberation with which the trial court dealt with the evidentiary issue, however, only highlights its failure to address what I believe must be the key inquiry: whether a mistrial, and its abrogation of a defendant's constitutionally protected interest in completing his trial before a particular tribunal, *United States* v. *Jorn*, 400 U. S. 470, 486 (1971) (plurality opinion of Harlan, J.); *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949), is the only way to secure the public interest in a just disposition of the charges.

I do not propose that the Constitution invariably requires a trial judge to make findings of necessity on the record to justify the declaration of a mistrial over a defendant's objec-

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is true, none of the comments by the court suggests a concern with the propriety of anything other than its ruling on the evidentiary question. See App. 225, 253. Second, the majority points to the fact that counsel each argued whether the prejudice could be cured by means other than a mistrial. But such argument occupied only a minuscule portion of each side's discussion and elicited no comment or response from the court.

Finally, the Court notes that at the *voir dire* of the jury, the trial court expressed concern about "poisoning of the panel" and that to allay this concern, the jury was questioned as to its knowledge of the reasons for a new trial. The transcript of the *voir dire*, however, suggests that this questioning had two purposes: to determine whether any jurors knew why there was a second trial, and to determine whether such knowledge would prejudice them in their deliberations. Tr. of *Voir Dire*, *supra*, at 35. Since no jurors knew of the reason for the new trial, no inquiry was made as to prejudice—recognized at this time by the court and by counsel as a separate issue. None of these portions of the record establishes that the trial court at any time made a determination that the prejudice from counsel's opening statement could not be cured by an instruction, or that the court had any basis, such as through a *voir dire*, on which to make such a determination.

tions. For example, where the nature of the error is one that "would make reversal [of any conviction] on appeal a certainty," *Illinois* v. *Somerville*, 410 U. S. 458, 464 (1973), the appropriate finding may be implied from the declaration of a mistrial.[11] What the "manifest necessity" doctrine does require, in my view, is that the record make clear either that there were no meaningful and practical alternatives to a mistrial, or that the trial court scrupulously considered available alternatives and found all wanting but a termination of the proceedings. See *United States* v. *Jorn*, *supra*, at 485; *Illinois* v. *Somerville*, *supra*, at 478–479 (MARSHALL, J., dissenting). The record here, as demonstrated above, does neither.

Where the need for a mistrial is not "plain and obvious," *United States* v. *Perez*, 9 Wheat., at 580, the importance of an affirmative indication that the trial court made the relevant findings is apparent. In the chaos of conducting a trial, with the welter of administrative as well as legal concerns that must occupy the mind of the trial judge, it is all too easy to overlook a legal rule or relevant factor in rendering decision. A requirement of some statement on the record addressed to the need for a mistrial would ensure that appropriate consideration is given to the efficacy of other alternatives and that mistrial decisions are not based upon improper, or only partly adequate, criteria. Of particular relevance here, moreover, it would facilitate proper appellate and habeas review, avoiding the need to speculate on the basis for the decision to terminate the trial.[12] These considerations have special force when a

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[11] See, *e. g.*, *Thompson* v. *United States*, discussed *ante*, at 512, and in n. 7, *supra*. Although not every error that would require reversal upon conviction necessitates a mistrial, frequently the "high degree of necessity" required by the *Perez* doctrine is present, and may be implied from the record if not expressed thereon, when an error of such magnitude prompts a mistrial. See *Illinois* v. *Somerville*, 410 U. S. 458, 477–483 (1973) (MARSHALL, J., dissenting).

[12] Moreover, given the wide variety of situations in which it may be appropriate to grant a mistrial, and the difficulty in setting forth a single

mistrial is sought on the ground of jury bias resulting from trial counsel's error. The trial court is uniquely situated to evaluate the seriousness of any such prejudice, see *ante*, at 513–514, and its failure contemporaneously to do so may preclude meaningful subsequent determination of whether the mistrial was properly granted over the defendant's objection. Thus, where the necessity for a mistrial is not manifest on the face of the record, I would hold that the record must clearly indicate that the trial court made a considered choice among the available alternatives.[13]

Had the court here explored alternatives on the record, or made a finding of substantial and incurable prejudice or other "manifest necessity," this would be a different case and one in which I would agree with both the majority's reasoning and its result.[14] On this ambiguous record, however, the

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standard that can provide meaningful guidance on each occasion, a statement of reasons by the trial court would contribute to the development of a body of rules, precedents, and principles that might be useful in providing guidance to other courts. Cf. *United States ex rel. Johnson* v. *Chairman of N. Y. State Bd. of Parole*, 500 F. 2d 925, 928–934 (CA2), vacated as moot, 419 U. S. 1015 (1974).

[13] Given the importance of respondent's constitutionally protected interest in avoiding unnecessary second trials, *United States* v. *Jorn*, 400 U. S., at 486, it might even be argued that a statement of reasons explicitly relating to the need for a mistrial is always required. I do not go this far here, but only observe that we have held in numerous contexts that governmental decisionmakers must state their reasons for decision, particularly where the decision is adverse to the constitutionally or statutorily protected interests of an individual. See, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970).

[14] In *Simmons* v. *United States*, 142 U. S. 148 (1891), discussed *ante*, at 512, the trial court had explained at length the reasons for its conclusion that there was a "manifest necessity" for the mistrial. 142 U. S., at 149–150. Indeed, even in *Thompson* v. *United States*, discussed *ante*, at 512, and in n. 7, *supra*, the trial court's finding that there was "no [other] way" to respond to the grand juror's presence on the petit jury sufficiently indicated on the record an exercise of discretion informed by the "manifest necessity" standard.

absence of any such finding—and indeed of any express indication that the trial court applied the manifest-necessity doctrine—leaves open the substantial possibility that there was in fact no need to terminate the proceedings. While the Court states that a "high degree" of necessity is required before a mistrial may properly be granted, its reading of the record here is inconsistent with this principle.

I would therefore affirm the judgment of the Court of Appeals.

FULMAN ET AL., TRUSTEES *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 76-1137. Argued November 29, 1977—Decided February 22, 1978

The provision of Treas. Reg. § 1.562-1 (a) that a personal holding company's distribution of appreciated property to its shareholders results, under §§ 561 and 562 of the Internal Revenue Code of 1954, in a dividends-paid deduction limited to an amount that is the adjusted tax basis of the property in the hands of the company at the time of the distribution *held* valid as having a reasonable basis, as against the contention that such deduction should be equal in amount to the fair market value of the property distributed. Given the fact that § 27 (d) of the Internal Revenue Code of 1939 expressly provided the "adjusted basis" measure for valuation of dividends paid in appreciated property rather than money, and the ambiguity surrounding the legislative history of § 562 of the 1954 Code, which sets forth the rules applicable in determining dividends eligible for the dividends-paid deduction but contains no counterpart to § 27 (d) of the 1939 Code, no "weighty reason" justifying setting aside the regulation in question can be identified. Pp. 530-539.

545 F. 2d 268, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment and concurring in part, *post*, p. 539. POWELL, J., filed a dissenting opinon, *post*, p. 539. BLACKMUN, J., took no part in the consideration or decision of the case.

Daniel D. Levenson argued the cause and filed briefs for petitioners.

Michael L. Paup argued the cause for the United States. With him on the brief were *Acting Solicitor General Friedman, Assistant Attorney General Ferguson, Stuart A. Smith,* and *Joseph L. Liegl.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is the validity of the provision of Treas. Reg. § 1.562–1 (a), 26 CFR § 1.562–1 (a) (1977), that a personal holding company's distribution of appreciated property to its shareholders results, under §§ 561 and 562 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 561 and 562, in a dividends-paid deduction limited to an amount that is "the adjusted basis of the property in the hands of the distributing corporation at the time of the distribution." [1] The Court of Appeals for the First Circuit sustained the validity of the provision in this case, 545 F. 2d 268 (1976), disagreeing with the Court of Appeals for the Sixth Circuit in *H. Wetter Mfg. Co.* v. *United States,* 458 F. 2d 1033 (1972), which had concluded that the limitation on the dividends-paid deduction is invalid and that a personal holding company is entitled to a deduction equal in amount to the fair market

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[1] "§ 561. Definition of deduction for dividends paid.

"(a) General rule.

"The deduction for dividends paid shall be the sum of—

"(1) the dividends paid during the taxable year,

. . . . . .

"(b) Special rules applicable.

"(1) In determining the deduction for dividends paid, the rules provided in section 562 . . . shall be applicable."

"§ 562. Rules applicable in determining dividends eligible for dividends paid deduction.

"(a) General rule.

"For purposes of this part, the term 'dividend' shall, except as otherwise provided in this section, include only dividends described in section 316 . . . ."

"§ 1.562–1 Dividends for which the dividends paid deduction is allowable.

"(a) *General rule.* . . . If a dividend is paid in property (other than money) the amount of the dividends paid deduction with respect to such property shall be the adjusted basis of the property in the hands of the distributing corporation at the time of the distribution. . . ."

value of property distributed.[2] We granted certiorari to resolve the conflict. 431 U. S. 928 (1977). We agree with the Court of Appeals for the First Circuit that the limitation on the dividends-paid deduction provided by the regulations is valid, and therefore affirm its judgment.

I

The maximum income tax rate applied to corporations has for many years been substantially below marginal tax rates applicable to high-income individuals. As early as 1913, Congress recognized that this disparity provided an incentive for individuals to create corporations solely to avoid taxes. In response Congress imposed a tax on the shareholders of any corporation "formed or fraudulently availed of" for the purpose of avoiding personal income taxes. Tariff Act of 1913, § II–A, Subdivision 2, 38 Stat. 166; see *Ivan Allen Co.* v. *United States,* 422 U. S. 617, 624–625, and n. 8 (1975). Section 220 of the Revenue Act of 1921, 42 Stat. 247, shifted the incidence of this tax to the corporation itself, where it has remained to this day. See *Ivan Allen Co.* v. *United States, supra,* at 625 n. 8.

Early statutes designed to combat abuse of the corporate form were not notably successful, however, and in 1934 Congress concluded that the "incorporated pocketbook"—a closely held corporation formed to receive passive investment property and to accumulate income accruing with respect to that property—had become a major vehicle of tax avoidance.[3]

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[2] Accord, *Gulf Inland Corp.* v. *United States,* 75–2 USTC ¶ 9620 (WD La.), appeal docketed, No. 75–3767 (CA5 1975). But see *C. Blake McDowell, Inc.* v. *Commissioner,* 67 T. C. 1043 (1977).

[3] See H. R. Rep. No. 704, 73d Cong., 2d Sess., pt. 1, pp. 11–12 (1934); Subcommittee of House Committee on Ways and Means, 73d Cong., 2d Sess., Preliminary Report on Prevention of Tax Avoidance 6–8 (Comm. Print 1934). For a history of the personal holding company tax, see Libin, Personal Holding Companies and the Revenue Act of 1964, 63 Mich. L. Rev. 421, 421–429 (1965).

Congress' response was the personal holding company tax, enacted in 1934, and now codified as §§ 541–547 and 561–565 of the Internal Revenue Code of 1954,[4] 26 U. S. C. §§ 541–547 and 561–565 (1970 ed. and Supp. V).

The object of the personal holding company tax is to force corporations which are "personal holding companies" [5] to pay in each tax year dividends at least equal to the corporation's undistributed personal holding company income—*i. e.*, its adjusted taxable income *less* dividends paid to shareholders of the corporation, see § 545—thus ensuring that taxpayers cannot escape personal taxes by accumulating income at the corporate level. This object is effectuated by imposing on a personal holding company *both* the ordinary income tax applicable to its operation as a corporation *and* a penalty tax of 70% on its undistributed personal holding company income. See §§ 541, 545, 561. Since the penalty tax rate equals or exceeds the highest rate applicable to individual taxpayers, see 26 U. S. C. § 1 (1970 ed. and Supp. V), it will generally be in the interest of those controlling the personal holding company to distribute all personal holding company income, thereby avoiding the 70% tax at the corporate level by reducing to zero the tax base against which it is applied.[6]

II

Petitioners are the successors to Pierce Investment Corp. In 1966 the Commissioner audited Pierce and determined that it was a personal holding company for the tax years 1959, 1960,

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[4] Sections 561–565 also define the dividends-paid deduction used in the accumulated earnings tax, 26 U. S. C. §§ 531–537 (1970 ed. and Supp. V).

[5] A personal holding company is defined as a corporation at least 60% of whose adjusted ordinary gross income is personal holding company income, and 50% of whose stock is owned by five or fewer persons. 26 U. S. C. § 542 (a). Personal holding company income is income from passive investment property such as dividends, rents, or royalties. § 543.

[6] Such dividends would, of course, be taxable to noncorporate shareholders at their fair market value. See 26 U. S. C. § 301 (b) (1) (A).

1962, and 1963. Deficiencies in personal holding company taxes of $26,571.30 were assessed against Pierce. In response to the audit, Pierce entered an agreement with the Commissioner pursuant to § 547 of the Code which provides that a corporation in Pierce's position may enter such an agreement, acknowledging its deficiency and personal holding company status, and may within 90 days thereafter make "deficiency dividend" payments that become a deduction against personal holding company income in the years for which a deficiency was determined and reduce that deficiency. Shares of stock Pierce held in other companies were promptly distributed as deficiency dividends. The fair market value of this stock at the time of distribution is agreed to have been $32,535; its adjusted tax basis, $18,725.11.

Pierce then filed a claim for a deficiency-dividend deduction, as required by § 547 (e), indicating that the value of dividends distributed for the tax years in question was $32,535. The Commissioner, relying on Treas. Reg. § 1.562–1 (a), allowed this claim only to the extent of Pierce's adjusted basis in the stock, and he determined a new deficiency after reducing Pierce's personal holding company income by the amount of the deficiency dividends allowed. Pierce paid this tax and the Commissioner denied its claim for a refund.

Petitioners as Pierce's successors thereafter brought a refund suit in the United States District Court for the District of Massachusetts, arguing that the deficiency dividends should have been valued at their fair market value. The District Court on cross-motions for summary judgment denied relief, 407 F. Supp. 1039 (1976), and the Court of Appeals for the First Circuit affirmed. Each court found the Treasury Regulation to be a reasonable interpretation of the personal holding company tax statute, and each expressly refused to follow the contrary holding of *H. Wetter Mfg. Co.* v. *United States, supra.*[7] Accordingly a refund was denied.

[7] In *Wetter,* the Sixth Circuit, adopting a "plain meaning" rule, held

III

"[I]t is fundamental . . . that as 'contemporaneous constructions by those charged with administration of' the Code, [Treasury] Regulations 'must be sustained unless unreasonable and plainly inconsistent with the revenue statutes,' and 'should not be overruled except for weighty reasons.'" *Bingler* v. *Johnson*, 394 U. S. 741, 749–750 (1969), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 501 (1948); accord, *United States* v. *Correll*, 389 U. S. 299, 306–307 (1967). This rule of deference is particularly appropriate here,[8] since, while obviously some rule of valuation must be applied, Congress, as we shall see, failed expressly to provide one. See *United States* v. *Correll, supra;* 26 U. S. C. § 7805 (a).

Section 547 (a) of the Code requires that a taxpayer who like Pierce pays dividends after a determination of liability by the Commissioner "shall be allowed" "a deduction . . . for the amount of deficiency dividends (as defined in subsection (d)) for the purpose of determining the personal holding company tax." Subsection 547 (d) in turn provides that

> "the term 'deficiency dividends' means the amount of the dividends paid by the corporation . . . , which would have been includible in the computation of the deduction for dividends paid under section 561 for the taxable year with respect to which the liability for personal holding

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that the 1954 Code required the rule of 26 U. S. C. § 301 to be used in establishing the value of the dividend deduction under the personal holding company tax. The meaning of the 1954 Code is, however, anything but plain.

[8] Although we have said that penalty tax provisions are to be strictly construed, see *Ivan Allen Co.* v. *United States*, 422 U. S. 617, 627 (1975); *Commissioner* v. *Acker*, 361 U. S. 87, 91 (1959), this rule of construction does not apply to the personal holding company tax since any penalty can be easily avoided by following—as petitioners' predecessor did—the guidelines set out in 26 U. S. C. § 547.

company tax exists, if distributed during such taxable year."

Continuing this chain of definitions, § 561 (a) provides that the deduction for dividends "shall be the sum of," *inter alia*, dividends paid during the taxable year; and § 561 (b)(1) points to § 562 as the source of a rule for valuing such dividends. Section 562, however, provides only exceptions to a basic rule said to be provided by § 316 of the Code, 26 U. S. C. § 316. But when we turn to § 316, the trail of definitions finally turns cold, for that section states only that a dividend is a "distribution of property made by a corporation to its shareholders" out of current or accumulated earnings or, in the case of personal holding companies, out of its current personal holding company income. Inexplicably, moreover, the draftsmen refer us back to § 562 for "[r]ules applicable in determining dividends eligible for dividends paid credit deduction." See Cross References following § 316.

Petitioners suggest that the way out of this circularity is to adopt the valuation rules for distributions of property found in § 301 of the Code, 26 U. S. C. § 301. We cannot agree, for § 301 deals not with the problem of valuing the distribution with respect to the *distributing corporation*, but establishes rules governing the valuation with respect to *distributees*. This is not to deny the logical force of petitioners' argument that, since the purpose of the personal holding company tax is to force individuals to include personal holding company income in their individual returns, the corporate distributor should get a deduction at the corporate level equal to the income generated by the distribution at the shareholder level as defined by § 301, that is, the fair market value of the appreciated property in this case.[9] See 26 U. S. C. § 301 (b)

[9] Petitioners also argue that the valuation standard provided by § 301 was expressly adopted by the House as the standard to be used in establishing the value of a dividend with respect to a corporation as well as to a distributee-shareholder. In H. R. 8300, 83d Cong., 2d Sess. (1954), the

(1)(A). Indeed, *H. Wetter Mfg. Co.* v. *United States*, 458 F. 2d 1033 (1972), and *Gulf Inland Corp.* v. *United States*, 75–2 USTC ¶ 9620 (WD La.), appeal docketed, No. 75–3767

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forerunner of the Internal Revenue Code of 1954, § 562 (a) referred to § 312 which stated: "The term 'dividend' when used in this subtitle means a distribution (*as determined in section 301 (a)*) . . . ." (Emphasis added.) Section 301 (a) defined a "distribution" as "the amount of money . . . and the fair market value of securities and property received" by a distributee. This, petitioners conclude, shows that Congress meant to use the standard of § 301, now codified as 26 U. S. C. § 301, as the standard for valuing distributions of property with respect to both the distributing corporation and the distributee-shareholder.

The language in § 312 italicized above was deleted by the Senate, however, and does not appear in § 316 of the 1954 Code—which corresponds to § 312 of H. R. 8300, *supra*. Moreover, as explained *infra*, at 536–538, the House Report states that the rule of § 27 (c) of the Revenue Act of 1936, 49 Stat. 1665, was incorporated in the 1954 Code. If that is indeed the case, then § 301 cannot be the section that governed valuation of property dividends under § 562 (a) of H. R. 8300, since § 301 does not embody the valuation rule of § 27 (c) with respect to distributions to noncorporate shareholders. Instead, H. R. 8300, § 301 (a), mandates the use of fair market value without regard to basis when the distributee is a noncorporate shareholder, whereas § 27 (c) mandated the use of the *lower* of basis or fair market value. The rule of § 27 (c) is used in H. R. 8300 only with respect to corporate distributees, taxpayers who were *not* the target of the personal holding company tax. There is, therefore, no unambiguous inference to be drawn from the linkage between §§ 301, 312, and 562 of the House bill. See also nn. 13–14, *infra*.

Finally, petitioners argue that our decision in *Ivan Allen Co.* v. *United States*, *supra*, supports their contention that fair market value must be the measure of property dividends. But this is not the case. As we made abundantly clear in *Ivan Allen*, the fair market value of liquid assets figures *only* in calculating whether "earnings and profits . . . [have been] permitted to accumulate beyond the reasonable needs of the business." 26 U. S. C. § 533 (a). Unrealized appreciation does not figure in the tax base to which the accumulated earnings tax applies. See 422 U. S., at 627, 633. Since *Ivan Allen* thus holds that appreciation does *not* figure in the accumulated earnings tax base, there is no justification for reasoning from that opinion that such appreciation must nonetheless figure in the dividends to be subtracted from that base.

(CA5 1975), have taken the view urged by petitioners, and but for the Regulation, the argument might well prevail.[10] But, as we have indicated, the issue before us is *not* how *we* might resolve the statutory ambiguity in the first instance, but whether there is any reasonable basis for the resolution embodied in the Commissioner's Regulation. We conclude that there is.

In the Revenue Act of 1936, Congress enacted a surtax on undistributed profits intended to supplement the 1934 enactment of the personal holding company tax. In § 27 (c) of the 1936 Act, 49 Stat. 1665, later codified as § 27 (d) of the Internal Revenue Code of 1939, 53 Stat. 20, Congress expressly provided the "adjusted basis" measure for valuation with respect to the distributing corporation of dividends paid in appreciated property rather than money:

> "If a dividend is paid in property other than money . . . the dividends paid credit with respect thereto shall be the adjusted basis of the property in the hands of the corporation at the time of the payment, or the fair market value of the property at the time of the payment, whichever is the lower."

Although this section may not have been enacted with the personal holding company tax primarily in mind,[11] § 351 (b) (2)(C) of the 1936 Act[12] nonetheless expressly provided that the dividends-paid credit for that tax would be governed by § 27 (c). At the same time, in contrast, the 1936 Act provided that property distributed as a dividend would be valued with

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[10] See generally Drake, Distributions in Kind and the Dividends Paid Deduction—Conflict in the Circuits, 1977 B. Y. U. L. Rev. 45.

[11] Section 27 was added as part of a general revision of the undistributed profits and accumulated earnings taxes. See S. Rep. No. 2156, 74th Cong., 2d Sess., 12–13, 16–18 (1936). There is no discussion in the legislative history of the 1936 Act of the reason for applying § 27 to personal holding companies.

[12] 49 Stat. 1732.

respect to distributees at its fair market value. See Revenue Act of 1936, § 115 (j), 49 Stat. 1689.

The relevant provisions of the 1936 Revenue Act were carried over without material change into the Internal Revenue Code of 1939. See §§ 27 (d), 115 (j), of that Code, 53 Stat. 20, 48. Thus, the logical symmetry between the gain recognized at the shareholder level and the dividend credit allowed at the corporate level, which petitioners argue should be the touchstone for our decision, was not part of the scheme of the Internal Revenue Code from 1936 to 1954.

Nor can Congress' failure to re-enact a counterpart to § 27 (c) in the 1954 Code be read unambiguously to indicate that Congress had abandoned the "adjusted basis" measure in favor of the "fair market value" measure. In describing the purpose of § 562 (a), which defines dividends eligible for deduction for personal holding company tax purposes, the Senate Finance Committee explained:

> "Subsection (a) provides that the term 'dividend' for purposes of this part shall include, except as otherwise provided in this section, only those dividends described in section 316 . . . . The requirements of sections 27 (d), (e), (f), and (i) of existing law [Internal Revenue Code of 1939, as amended] are contained in the definition of 'dividend' in section 312, and accordingly are not restated in section 562." S. Rep. No. 1622, 83d Cong., 2d Sess., 325 (1954).

The Report of the House Ways and Means Committee is *in haec verba*, except that it says that the requirements of §§ 27 (d), (e), (f), and (i) are contained in what is now § 316 of the 1954 Code.[13] See H. R. Rep. No. 1337, 83d Cong., 2d Sess.,

[13] The Court of Appeals theorized that this discrepancy may have been due to a typographical error in the Senate Report. As the bill which was to become the 1954 Code was passed by the House, the provisions of § 316 of the Code were set out as § 312. The Senate renumbered the bill, but adopted the discussion of the House Report essentially verbatim,

A181 (1954). The discrepancy between the House and Senate Reports is not material, however, since, as we have explained, there is no way to reach the result of § 27 (c) by following *any* path through the language of the 1954 Code.[14] In light of the failure of the language of the Code to create the result of § 27 (c), the statement in the House and Senate Reports could be read to indicate that Congress meant to incorporate only so much of § 27 as was actually enacted—that is, none of it. But this meaning is not compelled, and we cannot say that the language of the Reports cannot be read to evince Congress' intention, albeit erroneously abandoned in execution, to retain the "adjusted basis" valuation rule of § 27 (c).

At the least, it is not unreasonable for the Commissioner to have assumed that Congress intended to carry forward the law existing prior to the 1954 Code with respect to the measure of valuation. As we said in *United States* v. *Ryder*, 110 U. S. 729, 740 (1884): "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." Accord, *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 309 n. 12 (1975); *Muniz* v. *Hoffman*, 422 U. S. 454, 467–472 (1975); *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222,

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possibly failing to correct all instances where section numbers had changed. See 545 F. 2d, at 270 n. 2.

[14] If one assumes that S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), is correct in stating that Congress re-enacted § 27 (c) of the Revenue Act of 1936 as § 312 of the 1954 Code, 26 U. S. C. § 312, but see n. 13, *supra*, then Treas. Reg. 1.562–1 (a), 26 CFR § 1.562–1 (a) (1977), must be upheld because § 312 (a)(3) provides a dividend valuation rule identical to that of § 27 (c). But § 312 is on its face addressed only to the narrow issue of the effect of dividends on corporate earnings and profits, an issue unrelated to the personal holding company tax. Therefore § 312 is no more likely to be the correct locus of the re-enactment of § 27 (c) than § 301 of the Code. Moreover, even if the Senate did intend § 312 to be the locus of the rule of § 27 (c), ambiguity remains because the House, if it put § 27 (c) anywhere, put it in §§ 301 and 316 of the Code. See n. 9, *supra*.

227 (1957). If we will not read legislation to abandon previously prevailing law when, as here, a recodification of law is incomplete or departs substantially and without explanation from prior law, we cannot conclude that the Commissioner may not adopt a similar rationale in drafting his rule.[15] In any case, given the law under the 1939 Code and the ambiguity surrounding the House and Senate Reports on § 562, it is impossible to identify in this case any "weighty reasons" that would justify setting aside the Treasury Regulation.

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, concurring in the judgment and concurring in part.

The only portion of the Court's opinion which I am unable to join is that quoted by MR. JUSTICE POWELL in dissent. I do not see the ineluctable logical need to equate the amount of income received by the shareholder distributee with the amount of the deduction allowed the corporate distributor. In my judgment market value is the appropriate measure of the recipient's income, and adjusted basis is the appropriate debit on the corporation's books.

MR. JUSTICE POWELL, dissenting.

The Court's opinion, with commendable candor, recognizes that logic supports petitioners' position:

"[We do] not . . . deny the logical force of petitioners'

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[15] Treas. Reg. 1.562–1 (a), 26 CFR § 1.562–1 (a) (1977), does not, of course, correspond to § 27 (c) of the Revenue Act of 1936 in valuing *depreciated* property. The Treasury Regulation requires adjusted basis to be used in valuing all distributions of property; § 27 (c) provided that the

> argument that, since the purpose of the personal holding company tax is to force individuals to include personal holding company income in their individual returns, the corporate distributor should get a deduction at the corporate level equal to the income generated by the distribution at the shareholder level as defined by § 301, that is, the fair market value of the appreciated property in this case. See 26 U. S. C. § 301 (b)(1)(A)." *Ante*, at 534–535.

The Court also recognizes the "circularity," *ante*, at 534, and the "ambiguity," *ante*, at 536, of the relevant provisions of the Internal Revenue Code, as well as the absence of any clarification thereof in the legislative history. The Court simply resolves the statutory jumble in favor of the Treasury Regulation.

It is virtually conceded that this result cannot be squared with the acknowledged purpose of the personal holding company tax. Where statutory ambiguity exists without clarification in the legislative history, a court should read the statute to accord with its manifest purpose. A regulation that defies logic, as well as the statutory purpose, merits little weight.

I find no answer in the Court's opinion to the arguments advanced by Professor Drake. See Drake, Distributions in Kind and Dividends Paid Deduction—Conflict in the Circuits, 1977 B. Y. U. L. Rev. 45. See also *H. Wetter Mfg. Co.* v. *United States*, 458 F. 2d 1033 (CA6 1972).*

I respectfully dissent.

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lower of adjusted basis or fair market value would be used. See *supra*, at 536. However, we have no occasion to pass on the validity of § 1.562–1 (a) as applied to depreciated property since, even if it should be invalid in that circumstance, this would not help petitioners in this case.

*I do not view this as a case that, under the Court's holding today, the Government "wins" and personal holding company taxpayers (other than petitioners) "lose." It is not at all clear to me that the Court's resolution of the statutory ambiguity will in the end increase the Government's

"take." The personal holding company device is used by a limited number of sophisticated taxpayers. Under the "adjusted basis" rule upheld by this decision, many of them will be able to schedule the distribution of appreciated and depreciated property in an advantageous manner. Cf. *General Securities Co.* v. *Commissioner*, 42 B. T. A. 754 (1940), aff'd, 123 F. 2d 192 (CA10 1941). I simply would have preferred a resolution that advanced the symmetry of the relevant Code provisions, see, *e. g.*, 26 U. S. C. §§ 301, 311, and one compatible with the plain purpose of the personal holding company tax.

DURST ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76–5935. Argued December 5, 1977—Decided February 22, 1978

Petitioners, youth offenders, pleaded guilty to various federal offenses and, under § 5010 (a) of the Federal Youth Corrections Act (YCA), were given suspended sentences and placed on probation, which was conditioned on payment of fines and in one instance on making restitution. Their convictions were affirmed in the courts below. While now conceding that restitution is a permissible condition of probation under the YCA, petitioners contend that a sentence of probation under § 5010 (a) is a substitute for any other penalty provision, and that since § 5010 (a) does not expressly authorize fines, the authority to impose them cannot be imputed from any other penalty provision. They argue, moreover, that a fine is necessarily punitive and contrary to the rehabilitative goals of the YCA. *Held:* When a youth offender is placed on probation under § 5010 (a), restitution may be required, and, when the otherwise applicable penalty provision permits, a fine may be imposed as a condition of probation. Pp. 549–554.

(a) Though the language of § 5010 (a) neither grants nor withholds the authority to impose a fine or to order restitution, § 5023 (a) of the YCA incorporates by reference the authority conferred under the general probation statute, 18 U. S. C. § 3651 (1976 ed.), to permit such an exaction, and it is clear from the YCA's legislative history that Congress' purpose in adopting § 5023 (a) was to assure that a sentence under § 5010 (a) would not displace the authority under § 3651 to impose a fine and order restitution as conditions of probation. Pp. 549–553.

(b) In preserving the authority to impose a fine as a condition of probation Congress necessarily concluded that such a condition comports with YCA's rehabilitative goals. Pp. 553–554.

549 F. 2d 799, affirmed

BRENNAN, J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN, J., who took no part in the consideration or decision of the case.

Michael S. Frisch argued the cause for petitioners *pro hac vice*. With him on the brief was *Charles G. Bernstein*.

Solicitor General McCree argued the cause for the United States. With him on the brief were *Assistant Attorney General Civiletti, Deputy Solicitor General Frey, Marion L. Jetton, Jerome M. Feit,* and *Marshall Tamor Golding.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We granted certiorari, 430 U. S. 929 (1977), to decide whether a trial judge (or designated United States Magistrate) who suspends a sentence of commitment and places a youth offender on probation pursuant to § 5010 (a) of the Federal Youth Corrections Act (YCA), 18 U. S. C. § 5005 *et seq.* (1976 ed.), may impose a fine, or require restitution, or both, as conditions of probation.[1]

Each of the five petitioners pleaded guilty in a separate proceeding before a United States Magistrate to an offense for which penalties of fine or imprisonment or both are provided. Petitioners Durst and Rice pleaded guilty to obstruction of the mails in violation of 18 U. S. C. § 1701 (1976 ed.). Petitioners Blystone and Pinnick pleaded guilty to stealing property with a value less than $100 from a Government reservation in violation of 18 U. S. C. § 661 (1976 ed.). Petitioner Flakes pleaded guilty to theft of property belonging to the United States with a value less than $100 in violation of 18

[1] Courts of Appeals have reached conflicting conclusions concerning whether a fine is a permissible condition of a § 5010 (a) sentence. The Court of Appeals for the Ninth Circuit, *United States* v. *Bowens,* 514 F. 2d 440 (1975); *United States* v. *Mollet,* 510 F. 2d 625 (1975), in disagreement with the Court of Appeals for the Fourth Circuit in the instant case, has held that imposition of a fine is improper. The Ninth Circuit, *United States* v. *Hayes,* 474 F. 2d 965 (1973), and the Fifth Circuit, *Cramer* v. *Wise,* 501 F. 2d 959 (1974), have held that a fine is not permissible in conjunction with a § 5010 (b) sentence. With respect to orders of restitution, however, the Courts of Appeals that have addressed the question, the Ninth Circuit in *United States* v. *Hix,* 545 F. 2d 1247 (1976), and the Third Circuit in *United States* v. *Buechler,* 557 F. 2d 1002 (1977), agree with the Court of Appeals in this case that an order of restitution properly may be imposed in conjunction with a sentence under § 5010 (a).

U. S. C. § 641 (1976 ed.). Each petitioner was sentenced by a Magistrate, under § 5010 (a), to probation and a suspended sentence of imprisonment.[2] Petitioner Flakes was ordered to pay a fine of $50 as a condition of probation and each of the others $100. Petitioner Durst was also ordered to make restitution, in the amount of $160, as a condition of probation.

Each petitioner appealed his sentence to the United States District Court for the District of Maryland, which consolidated and affirmed the appeals. Crim. Action No. N–75–0828 (June 25, 1976). The United States Court of Appeals for the Fourth Circuit affirmed in an unpublished *per curiam* opinion, No. 76–1905 (Dec. 9, 1976), judgt. order reported at 549 F. 2d 799, relying on its earlier decision in *United States* v. *Oliver,* 546 F. 2d 1096 (1976), cert. pending, No. 76–5632, which had held that imposition of a fine as a condition of probation was consistent with the YCA. In addition, the *per curiam* in the instant case stated: "For the reasons expressed in *Oliver,* we believe that a requirement of restitution is also consistent." App. 2. We agree that, when placing a youth offender on probation under § 5010 (a), the sentencing judge may require restitution, and, when the otherwise applicable penalty provision permits, impose a fine as a condition of probation, and therefore affirm the judgment of the Court of Appeals.

I

The YCA is primarily an outgrowth of recommendations of the Judicial Conference of the United States, see *Dorszynski* v. *United States,* 418 U. S. 424, 432 (1974), designed to reduce criminality among youth. Congress found that between the ages of 16 and 22, "special factors operated to produce habitual criminals. [Moreover,] then-existing methods of treating

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[2] Rice, a young adult, was sentenced under § 5010 (a) pursuant to 18 U. S. C. § 4216 (1976 ed.), which permits sentencing of young adult offenders under the YCA in appropriate cases.

criminally inclined youths were found inadequate in avoiding recidivism." *Id.*, at 432–433 (citation omitted).

The core concept of the YCA, like that of England's Borstal System upon which it is modeled,[3] is that rehabilitative treatment should be substituted for retribution as a sentencing goal.[4] Both the Borstal System and the YCA incorporate three features thought essential to the operation of a successful rehabilitative treatment program: flexibility in choosing among a variety of treatment settings and programs tailored to individual needs;[5] separation of youth offenders from

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[3] See S. Rep. No. 1180, 81st Cong., 1st Sess., 4 (1949); Prevention of Crime Act of 1908, 8 Edw. 7, ch. 59, pt. 1; The Criminal Justice Act of 1948, 11 & 12 Geo. 6, ch. 58; Criminal Justice Act of 1961, 9 & 10 Eliz. 2, ch. 39. For a discussion of the similarities between the Borstal System and the YCA, see Note, The Federal Youth Corrections Act: Past Concern in Need of Legislative Reappraisal, 11 Am. Crim. L. Rev. 229, 233–242 (1972).

[4] "The underlying theory of the bill is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." H. R. Rep. No. 2979, 81st Cong., 2d Sess., 3 (1950).

[5] The Act provides that committed youth "shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies . . . of treatment." 18 U. S. C. § 5011 (1976 ed.). Moreover, it provides for the examination, classification, and periodic re-evaluation of youth on an individual basis in order to tailor the Act's programs to individual needs. See 18 U. S. C. §§ 5014–5017 (1976 ed.).

The basis for this emphasis on individualized and flexible treatment programs was the Borstal System which the Act emulated. That program was described in H. R. Rep. No. 2979, *supra*, at 5, as follows:

"[The Borstal System] now embraces 13 institutions. Some are walled. Others are completely open. Each institution has its own particular specialty.

"One provides complete facilities for trade training in metal and woodwork. Another is laid out and run as a summer camp with work and recreational programs which keep the boys out of doors. A third is

hardened criminals; [6] and careful and flexible control of the duration of commitment and of supervised release.[7] The YCA established the framework for creation of a treatment

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largely devoted to agriculture and stock raising. One institution graduates skilled workers in the building trades.

"While the institutions differ in many respects, they have certain things in common. . . .

"Second, an individual plan based on close acquaintance with individual needs and antecedents and calculated to return the young men to society as social and rehabilitated citizens.

. . . . . .

"Three cardinal principles dominate the system: (1) flexibility, (2) individualization, and (3) emphasis on the intangibles."

[6] "By herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened, and by subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques, without the inhibitions that come from normal contacts and counteracting prophylaxis, many of our penal institutions actively spread the infection of crime and foster, rather than check, it." H. R. Rep. No. 2979, *supra*, at 2–3.

[7] The statement of Mr. Bennett, the Director of the Bureau of Prisons, before the Senate Subcommittee explained the need for an indeterminate sentence with discretion vested in the Youth Corrections Division of the Bureau to release the offender at the appropriate time. Mr. Bennett said:

"From the hundreds of cases of this type which have come across my desk I have formed the conclusion that in the task of correcting the offender the crucial element is that of time. Attitudes, habits, interests, standards cannot be changed overnight. Training in work habits and skills requires time. Once the individual has received the maximum benefit from the institutional program, however, it is just as important that his release to the community be effected promptly. In the case of each person confined there comes a period when he has his best prospects of making good in the community. His release should occur at this time. If he is released earlier he will not be ready for the task of establishing himself; if later, he may have become bitter, unsure of himself, or jittery like the athlete who is overtrained.

"Rarely does a day go by in one of our institutions for younger offenders without a youth being received whose sentence is either far too long or far too short, if the institution is to carry out its objective of correctional

program incorporating these features, and, as an alternative to existing sentencing options, authorized a sentence of commitment to the Attorney General for treatment under the Act. *Dorszynski, supra,* at 437–440.

The Act contains four provisions regarding sentencing. Section 5010 (a) provides that "[i]f the court is of the opinion that the youth offender does not need commitment," imposition or execution of sentence might be suspended and the youth offender placed on probation. Sections 5010 (b) and (c) provide that, if the youth is to be committed, the court might "in lieu of the penalty of imprisonment otherwise provided by law," sentence the youth offender to the custody of the Attorney General for treatment and supervision. Section 5010 (d) provides that "[i]f the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c)," the court may sentence the youth offender "under any other applicable penalty provision." [8]

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treatment." Correctional System For Youth Offenders: Hearings on S. 1114 and S. 2609 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., 27 (1949).

Congress provided the Bureau with the flexibility sought by providing in § 5017 for flexible commitment periods responsive to individual needs and progress.

[8] Section 5010 provides in full:

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017 (c) of this chapter; or .

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the

A particularly valuable benefit for the offender sentenced under the YCA is the prospect of obtaining a certificate setting aside his conviction. A certificate automatically issues when a youth committed to the custody of the Attorney General under § 5010 (b) or § 5010 (c) is unconditionally released prior to expiration of the maximum sentence imposed. 18 U. S. C. § 5021 (a) (1976 ed.). In 1961, the YCA was amended to extend the benefit of a certificate to youths sentenced to probation under § 5010 (a) when the court unconditionally discharges the youth prior to expiration of the sentence of probation imposed. Act of Oct. 3, 1961, Pub. L. No. 87–336, 75 Stat. 750 (codified at 18 U. S. C. § 5021 (b) (1976 ed.)).

Petitioners make two arguments in support of their submission that sentencing judges choosing the option under § 5010 (a) of suspending sentence and placing the youth offender on probation may not impose a fine as a condition of probation.[9] First, they argue that the sentencing provisions of the YCA are alternatives to other sentencing provisions and

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penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017 (d) of this chapter.

"(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

"(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings."

[9] Petitioners abandoned the contention contained in their petition for certiorari that a § 5010 (a) sentence may not be conditioned upon restitution. See n. 11, *infra*.

therefore a substitute for the penalties provided in the statute for violation of which the youth offender was convicted; since § 5010 (a) does not explicitly authorize the imposition of fines, sentencing judges have no authority to impose them when sentencing under that provision. Second, they argue that fines are necessarily punitive and their imposition therefore inconsistent with the rehabilitative goals of the YCA. Neither of these arguments has merit.

II

The language of § 5010 (a) neither grants nor withholds the authority to impose fines or orders of restitution. Another provision of the YCA, however, § 5023 (a), incorporates by reference the authority conferred under the general probation statute to permit such exactions. Section 5023 (a) provides: "Nothing in [the Act] shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 [§§ 3651–3656] of this title . . . relative to probation." Chapter 231 is the general probation statute and 18 U. S. C. § 3651 (1976 ed.) expressly provides, *inter alia:*

> "While on probation and among the conditions thereof, the defendant—
>
> "May be required to pay a fine in one or several sums; and
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ." [10]

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[10] Section 3651 provides in relevant part:

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defend-

Petitioners argue, however, that the sentencing provisions contained in § 5010 are separate and distinct from each other and from any other penalty provision. Recognizing that § 5023 (a) makes § 3651 applicable to a § 5010 (a) sentence, they now concede [11] that restitution is a permissible condition of a probationary sentence under § 5010 (a), because § 3651 directly authorizes restitution without resort to any other penalty provision. On the other hand, a fine may be imposed under § 3651 only if the penalty provision of the offense under which the youth is convicted so provides.[12] Thus, a fine is not permissible in conjunction with a § 5010 (a) sentence because it requires resort to the offense penalty provision.

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ant on probation for such period and upon such terms and conditions as the court deems best.

. . . . .

"While on probation and among the conditions thereof, the defendant—

"May be required to pay a fine in one or several sums; and

"May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ."

[11] Petitioners apparently agree with the Court of Appeals for the Ninth Circuit which held in *United States* v. *Hix*, 545 F. 2d 1247 (1976), that a fine is inherently punitive but restitution is essentially rehabilitative. Brief for Petitioners 11. In their brief, petitioners argued that restitution is *not* a permissible condition of probation, however, because "[i]t is . . . a real concern that sentencing courts may use restitution as a vehicle to accomplish that which is not permitted by the statute. Further, since the Federal Youth Corrections Act is an exclusive sentencing statute, any sentence beyond the limits of the Act is improper." *Ibid.* During oral argument, petitioners expressly abandoned this argument, conceding that restitution is a permissible condition of probation because it is directly authorized by § 3651. Tr. of Oral Arg. 5, 8, 9.

[12] The Government conceded that § 3651 permits imposition of a fine "only when the underlying statute calls for fine and/or imprisonment." Tr. of Oral Arg. 12. We need not address the question suggested by this phrasing, that a fine may be imposed when the underlying offense statute provides only a penalty of imprisonment. Compare *id.*, with Letter from Francis Biddle to Francis E. Walter, quoted, *infra*, at 552.

Petitioners' arguments are refuted by the legislative history of the Act. The legislative history of § 5023 (a) clearly reveals that Congress intended thereby to preserve to sentencing judges their powers under the general probation statute when sentencing youth offenders to probation under § 5010 (a). The House Report accompanying S. 2609, 81st Cong., 1st Sess. (1949), the bill which was enacted as the YCA, makes that clear in stating:

> "Under [the bill's] provisions, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. Thus, the *power* of the court to grant probation *is left undisturbed* by the bill." (Emphasis added.) H. R. Rep. No. 2979, 81st Cong., 2d Sess., 3 (1950).

The same view was expressed during the House hearings on H. R. 2140, 78th Cong., 1st Sess. (1943), a bill whose youth corrections provisions were nearly identical to those of S. 2609 introduced in 1949. Judge Phillips, Chairman of the Subcommittee responsible for drafting model youth correction legislation to be sponsored by the Judicial Conference, emphasized that "[i]t leaves [the probation system] absolutely undisturbed," [13] for the intent of the Judicial Conference in

[13] The full statement of Judge Phillips' remark regarding the bill's effect on the probation system is as follows:

"Mr. Cravens. Does this bill in any way affect the so-called probation system?

"Judge Phillips. Not at all.

"Mr. Cravens. There is no attempt to disturb that?

"Judge Phillips. No sir; we found it was working well and concluded it ought not to be disturbed.

"Mr. Cravens. And this bill was drafted with that in mind?

"Judge Phillips. Yes, sir. It leaves it absolutely undisturbed." Federal Corrections Act and Improvement in Parole: Hearings on H. R. 2139 and H. R. 2140 before Subcommittee No. 3 of the Committee on the Judiciary, 78th Cong., 1st Sess., 37 (1943) (hereinafter 1943 House Hearings).

sponsoring the bill was to retain the existing options with respect to probation and adult punishment, while simply adding a new option of commitment for treatment. See 1943 House Hearings 34–37.

The legislative history of §§ 5010 (b) and 5010 (c) buttresses this understanding of the purpose of § 5023 (a). Those subsections provide that commitment to the custody of the Attorney General is "in lieu of the penalty of imprisonment otherwise provided by law." The words "of imprisonment" did not appear in the original bill recommended by the Judicial Conference in 1943. H. R. 2140, *supra*, tit. III, § 1 (a), reprinted in 1943 House Hearings 3. Addition of the words "of imprisonment" was recommended in a letter from Attorney General Biddle to the House Subcommittee. That letter, in which, according to the letter, members of the Judicial Conference concurred and which was read into the record at the Subcommittee hearings, explained the reason for adding the words "of imprisonment" as follows:

> "Sentence of the youth offender to the custody of the Authority should be a permissible alternative to a penalty of imprisonment otherwise provided by law *but not to a penalty of a fine.* It should, moreover, be possible for the court both to impose a fine and to sentence the offender to the custody of the Authority, where the law provides both fine and imprisonment as the penalties that may be imposed." (Emphasis added.) Letter from Francis Biddle to Francis E. Walter (June 7, 1943), reprinted in 1943 House Hearings 110–111.

When introduced, S. 2609, *supra*, which was enacted into law, contained the words "of imprisonment" recommended by Attorney General Biddle. This history of subsection (b) demonstrates that Congress added the words "of imprisonment" in order to preserve the pre-existing authority of judges to impose a fine in conjunction with commitment when the applicable penalty provision provided for a penalty of fine and

imprisonment. The fact that Congress contemplated that a sentence under subsections (b) and (c) would permit resort to the otherwise applicable penalty provision as authority for imposition of a fine, militates in favor of the same construction with respect to subsection (a). There is no reason to believe that Congress directed that the subsections should be treated differently in that respect.[14]

We conclude that Congress' purpose in adopting § 5023 (a), was to assure that a sentence under § 5010 (a) would not displace the authority conferred by § 3651 to impose fines and orders of restitution as conditions of probation.

With respect to petitioners' second argument, that fines are punitive and their imposition therefore inconsistent with the rehabilitative goals of the YCA,[15] it is sufficient answer that Congress expressed its judgment to the contrary in preserving the authority of sentencing judges to impose them as a condition of probation. Moreover, we are not persuaded that fines should necessarily be regarded as other than rehabilitative when imposed as a condition of probation. There is much force in the observation of the District Court:

> "[A] fine could be consistent . . . with the rehabilitative intent of the Act. By employing this alternative [a fine

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[14] Petitioners argued that Congress may have intended to authorize imposition of a fine on one sentenced to commitment under subsection (b), yet to withhold such authority as to one sentenced to probation under subsection (a) based on the "qualitative" distinction between people sentenced under those subsections. Tr. of Oral Arg. 8. If that argument is based on a perceived distinction between the treatment needs of the two "classes" of youth offenders, it is without support in the history of the Act, and conflicts with the Act's emphasis on flexibility and individualization of treatment. See n. 5, *supra*. If the premise of the argument is that those sentenced to commitment merit a fine as punishment, while those sentenced to probation do not, it conflicts with the basic purpose of the Act to accord youth offenders rehabilitative treatment rather than retributive punishment. See n. 4, *supra*.

[15] See *ibid.*, and accompanying text.

and probation], the sentencing judge could assure that the youthful offender would not receive the harsh treatment of incarceration, while assuring that the offender accepts responsibility for his transgression. The net result of such treatment would be an increased respect for the law and would, in many cases, stimulate the young person to mature into a good law-abiding citizen." App. 36–37.

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

Syllabus

PROCUNIER, CORRECTIONS DIRECTOR, ET AL. *v.* NAVARETTE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76–446. Argued October 11, 1977—Decided February 22, 1978

Respondent state prisoner brought an action pursuant to 42 U. S. C. § 1983 against petitioner prison officials, alleging, *inter alia*, negligent interference with respondent's outgoing mail in violation of his constitutional rights under the First and Fourteenth Amendments. The District Court granted summary judgment for petitioners on this claim on the basis of their asserted qualified immunity from liability for damages under § 1983. The Court of Appeals reversed, holding that prisoners are entitled to First and Fourteenth Amendment protection for their outgoing mail, that the claim in question stated a cause of action under § 1983, and that summary judgment for petitioners was improper because, viewing the evidence in the light most favorable to respondent, petitioners were not entitled to prevail as a matter of law. *Held:* The Court of Appeals erred in reversing the District Court's summary judgment for petitioners. Pp. 560–566.

(a) Petitioners, as state prison officials, were entitled to immunity unless they "knew or reasonably should have known" that the action they took with respect to respondent's mail would violate his federal constitutional rights, or they took the action with the "malicious intention" to cause a deprivation of constitutional rights or other injury to respondent. *Wood* v. *Strickland*, 420 U. S. 308, 322. Pp. 561–562.

(b) There was no established First and Fourteenth Amendment right protecting state prisoners' mail privileges at the time in question, and therefore, as a matter of law, there was no basis for rejecting the immunity defense on the ground that petitioners knew or should have known that their alleged conduct violated a constitutional right. Pp. 562–565.

(c) Neither should petitioners' immunity defense be overruled under the standard authorizing liability where the defendant state official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury," since the claim in question charged negligent conduct, not intentional injury. P. 566.

536 F. 2d 277, reversed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., *post*, p. 566, and STEVENS, J., *post*, p. 568, filed dissenting opinions.

Sanford Svetcov, Deputy Attorney General of California, argued the cause for petitioners. With him on the brief were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, and *W. Eric Collins*, Deputy Attorney General.

Michael E. Adams argued the cause and filed a brief for respondent.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Respondent Navarette, an inmate of Soledad Prison in California when the events revealed here occurred, filed his second amended complaint on January 19, 1974, charging six prison officials with various types of conduct allegedly violative of his constitutional rights and of 42 U. S. C. §§ 1983 and 1985.[1] Three of the defendants were subordinate officials at Soledad;[2] three were supervisory officials: the director of the

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**Leon Friedman*, *Joel M. Gora*, and *Alvin J. Bronstein* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

[1] Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1985 proscribes certain conspiracies interfering with civil rights.

[2] The named subordinate officials were two correctional counselors at Soledad and a member of the prison staff in charge of handling incoming and outgoing prisoner mail. The complaint also referred to unnamed defendants Does I through IV.

State Department of Corrections and the warden and assistant warden of Soledad. The first three of nine claims for relief alleged wrongful interference with Navarette's outgoing mail. The first claim charged that the three subordinate officers, who were in charge of mail handling, had failed to mail various items of correspondence during the 15 months that respondent was incarcerated at Soledad, from September 1, 1971, to December 11, 1972. These items, described in 13 numbered paragraphs, included letters to legal assistance groups, law students, the news media, and inmates in other state prisons, as well as personal friends. Some of these items had been returned to Navarette, some the defendants had refused to send by registered mail as Navarette had requested, and, it was alleged, none of the items had ever reached the intended recipient. This "interference" or "confiscation" was asserted to have been in "knowing disregard" of the applicable statewide prisoner mail regulations [3] and of Navarette's "constitutional rights," including his rights to free speech and due process as guaranteed by the First, Fifth, and Fourteenth

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[3] Regulations promulgated January 5, 1970, permitted each inmate to send letters to 10 persons on an approved correspondence list plus other special-purpose letters as authorized. Director's Rule ("D.") 2403. Except with permission of the institutional head, correspondence with other inmates was prohibited. D. 2402 (13). The inmate was also advised:

"You may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate." D. 2402 (8).

The regulations assured confidentiality for correspondence with state and federal officials and also stated:

"Nothing in these rules shall deprive you of correspondence with your attorney, or with the courts having jurisdiction over matters of legitimate concern to you." D. 2402 (10).

These regulations controlled prisoner correspondence until August 10, 1972, and were in effect at the time that all but one of respondent's letters were posted. Subsequent regulations expanded inmate correspondence rights.

Amendments to the United States Constitution. The three supervisory officers were alleged to have knowingly condoned this conduct and to have conspired with their subordinates for forbidden ends.

The second claim for relief alleged wrongful failure to mail the same items of correspondence and asserted that the "interference or confiscation" had been conducted with "bad faith disregard" for Navarette's rights. The third claim posed the same failures to mail but claimed that the "interference" or "confiscation" had occurred because the three subordinate officers had "negligently and inadvertently" misapplied the prison mail regulations and because the supervisory officers had "negligent[ly]" failed to provide sufficient training and direction to their subordinates, all assertedly in violation of Navarette's constitutional rights.

Petitioners moved for dismissal for failure to state a claim on which relief could be granted or alternatively for summary judgment. Affidavits in support of the motion and counter-affidavits opposing it were also before the District Court. By order and without opinion, the court then granted summary judgment for petitioners on the first three claims and dismissed the remaining claims for failure to state a federal claim.[4]

The Court of Appeals reversed as to the first three claims. *Navarette* v. *Enomoto*, 536 F. 2d 277 (CA9 1976). It held, first, that prisoners themselves are entitled to First and Fourteenth Amendment protection for their outgoing mail and that Navarette's allegations were sufficient to encompass proof that would entitle him to relief in damages. Second, the court ruled

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[4] Claims 4, 5, and 6 concerned the termination of a law student visitation program in which respondent had participated and the removal of respondent from the post of prison librarian. Claims 7, 8, and 9 realleged the substance of claims 1 through 6 and sought to hold the supervisory officials liable upon a theory of vicarious rather than personal liability. All nine claims also claimed a conspiracy in violation of 42 U. S. C. § 1985.

that summary judgment on the first two claims was improper because there were issues of fact to be tried, particularly with respect to the claim that "a reasonable and good faith belief of a state official that his or her conduct is lawful, even where in fact it is not, constitutes a complete defense to a § 1983 claim for damages." *Id.*, at 280. Third, the Court of Appeals held that Navarette's "allegations that state officers negligently deprived him of [his constitutional] rights state a § 1983 cause of action" and that summary judgment on the third purported claim was "improper because, as in the case of counts one and two, viewing the evidence in the light most favorable to Navarette, we are unable to say appellees are entitled to prevail as a matter of law." *Id.*, at 282, and n. 6.[5]

We granted certiorari, 429 U. S. 1060, and the question before us is whether the Court of Appeals correctly reversed the District Court's judgment with respect to Navarette's third claim for relief alleging negligent interference with a claimed constitutional right.[6]

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[5] The Court of Appeals also reversed the ruling of the District Court with respect to the 4th, 5th, and 6th claims on the theory that "[t]he termination or denial of prison privileges because of a prisoner's legal activities on his own behalf or those of other inmates is an impermissible interference with his or her constitutional right of access to the courts." 536 F. 2d, at 280. Since this issue is not related to the question on which we granted certiorari, we express no view on the resolution of these claims by the court below.

The Court of Appeals affirmed the District Court's dismissal of the claims based on vicarious liability (claims 7, 8, and 9) and also affirmed its dismissal of all claims predicated on 42 U. S. C. § 1985. 536 F. 2d, at 282. Neither of these issues is raised here.

[6] The questions presented in the petition for certiorari were:

"1. Whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?

"2. Whether removal of a prisoner as a prison law librarian and termination of a law student-inmate visitation program in which he participated states a cause of action under the Civil Rights Act for either

In support of their motion for summary judgment, petitioners argued that on the record before the court they were immune from liability for damages under § 1983 and hence were entitled to judgment as a matter of law. The claim was not that they shared the absolute immunity accorded judges and prosecutors but that they were entitled to the qualified immunity accorded those officials involved in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), and *Wood* v. *Strickland*, 420 U. S. 308 (1975). The Court of Appeals appeared to agree that petitioners were entitled to the claimed degree of immunity but held that they were nevertheless not entitled to summary judgment because in the court's view there were issues of fact to be resolved and because when the facts were viewed most favorably to respondent, it could not be held that petitioners were entitled to judgment as a matter of law. Without disagreeing that petitioners enjoyed a qualified immunity from damages liability under § 1983, respondent defends

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knowingly or negligently interfering with the prisoner's right of access to the courts?

"3. Whether deliberate refusal to mail certain of a prisoner's correspondence in 1971–1972 prior to *Procunier* v. *Martinez*, 416 U. S. 396 (1974), and refusal to send certain correspondence by registered mail states a cause of action for violation of his First Amendment right to free expression?"

Our order granting the petition was limited to Question No. 1. In their submissions on the merits, the parties deal with this issue as subsuming the questions whether at the time of the occurrence of the relevant events the Federal Constitution had been construed to protect Navarette's mailing privileges and whether petitioners knew or should have known that their alleged conduct violated Navarette's constitutional rights. Since consideration of these issues is essential to analysis of the Court of Appeals' reversal of summary judgment on claim 3 of the complaint, we shall also treat these questions as subsidiary issues "fairly comprised" by the question presented. This Court's Rule 23.1 (c). In any event, our power to decide is not limited by the precise terms of the question presented. *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U. S. 313, 320 n. 6 (1971).

the judgment of the Court of Appeals as a proper application of § 1983 and of the Court's cases construing it.

Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials. Legislators, judges, and prosecutors have been held absolutely immune from liability for damages under § 1983. *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976). Only a qualified immunity from damages is available to a state Governor, a president of a state university, and officers and members of a state National Guard. *Scheuer* v. *Rhodes*, *supra*. The same is true of local school board members, *Wood* v. *Strickland*, *supra;* of the superintendent of a state hospital, *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975); and of policemen, *Pierson* v. *Ray*, *supra;* see *Imbler* v. *Pachtman*, *supra*, at 418–419.

We agree with petitioners that as prison officials and officers, they were not absolutely immune from liability in this § 1983 damages suit and could rely only on the qualified immunity described in *Scheuer* v. *Rhodes*, *supra*, and *Wood* v. *Strickland*, *supra*.[7] *Scheuer* declared:

> "[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as

[7] The Courts of Appeals have generally accorded prison and jail administrators performing discretionary functions a qualified immunity from monetary liability under § 1983. *E. g.*, *Knell* v. *Bensinger*, 522 F. 2d 720 (CA7 1975); *Hoitt* v. *Vitek*, 497 F. 2d 598, 601 (CA1 1974); *Dewell* v. *Lawson*, 489 F. 2d 877 (CA10 1974); *Anderson* v. *Nosser*, 438 F. 2d 183 (CA5 1971), modified on rehearing, 456 F. 2d 835 (1972); see *Bryan* v. *Jones*, 530 F. 2d 1210 (CA5), cert. denied, 429 U. S. 865 (1976).

> they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U. S., at 247–248.

We further held in *Wood* v. *Strickland,* that "if the work of the schools is to go forward," there must be a degree of immunity so that "public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." 420 U. S., at 321. This degree of immunity would be unavailable, however, if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." *Id.,* at 322. The official cannot be expected to predict the future course of constitutional law, *ibid.; Pierson* v. *Ray, supra,* at 557, but he will not be shielded from liability if he acts "with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U. S., at 322.

Under the first part of the *Wood* v. *Strickland* rule, the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm. Petitioners claim that in 1971 and 1972 when the conduct involved in this case took place there was no established First Amendment right protecting the mailing

privileges of state prisoners and that hence there was no such federal right about which they should have known. We are in essential agreement with petitioners in this respect and also agree that they were entitled to judgment as a matter of law.

In ruling that petitioners' conduct had encroached on Navarette's First Amendment rights, the Court of Appeals relied on two of its own decisions, one in 1973 and the other in 1974, as well as upon *Martinez* v. *Procunier*, 354 F. Supp. 1092 (ND Cal.), a 1973 three-judge court opinion with which the Court of Appeals said it was in essential agreement. The court relied on no earlier opinions, and this Court, in affirming the judgment in *Martinez* v. *Procunier*, did so on the ground that the constitutional rights of the addressees of a prisoner's correspondence were involved when prison officials interfered with a prisoner's outgoing mail. *Procunier* v. *Martinez*, 416 U. S. 396 (1974). The question of the rights of the prisoner himself was left open. The Court referred to the "tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights" which has "led the federal courts to adopt a variety of widely inconsistent approaches to the problem" of constitutional challenges to censorship of prisoner mail and to the "absence of any generally accepted standard for testing the constitutionality of prison mail censorship regulations . . . ." *Id.*, at 406, 407. Some Courts of Appeals were said to have maintained a "hands off posture"; [8] others to have extended various degrees of protection to prisoners' mail.[9] The Court

[8] 416 U. S., at 406, citing *McCloskey* v. *Maryland*, 337 F. 2d 72 (CA4 1964); *Lee* v. *Tahash*, 352 F. 2d 970 (CA8 1965); *Krupnick* v. *Crouse*, 366 F. 2d 851 (CA10 1966); *Pope* v. *Daggett*, 350 F. 2d 296 (CA10 1965).

[9] 416 U. S., at 406–407, citing, *inter alia*, *Sostre* v. *McGinnis*, 442 F. 2d 178, 199 (CA2 1971) (censorship of personal correspondence must have support "in any rational and constitutionally acceptable concept of a prison system"); *Jackson* v. *Godwin*, 400 F. 2d 529 (CA5 1968) (censorship of prisoner mail must be supported by a compelling state interest); *Wilkinson* v. *Skinner*, 462 F. 2d 670, 672–673 (CA2 1972) (requiring a "clear and present danger").

referred to no relevant pronouncements by courts in the Ninth Circuit other than the one then under review; and it is apparent that Procunier, the defendant in the *Martinez* suit and in this one, was then maintaining that there was no established constitutional right protecting prison mail under which his mail regulations could be challenged.[10]

Respondent relies on *Hyland* v. *Procunier*, 311 F. Supp. 749 (ND Cal. 1970); *Gilmore* v. *Lynch*, 319 F. Supp. 105 (ND Cal. 1970), aff'd *sub nom. Younger* v. *Gilmore*, 404 U. S. 15 (1971); *Northern* v. *Nelson*, 315 F. Supp. 687 (ND Cal. 1970); *Payne* v. *Whitmore*, 325 F. Supp. 1191 (ND Cal. 1971); and *Brenneman* v. *Madigan*, 343 F. Supp. 128 (ND Cal. 1972). But none of these cases deals with the rights of convicted prisoners in their mail and none furnishes an adequate basis for claiming that in 1971 and 1972 there was a "clearly established" constitutional right protecting Navarette's correspondence involved in this case.[11]

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[10] The jurisdictional statement filed by Procunier stated that "the vast majority of reported cases held that restrictions on the extent and character of prisoners' correspondence and examination and censorship thereof are inherent incidents in the conduct of penal institutions," but noted that in the federal courts there were "widely diverging views regarding the scope and propriety of federal intervention in matters of internal prison regulation," particularly with respect to inmate mail. Jurisdictional Statement filed in *Procunier* v. *Martinez*, O. T. 1973, No. 72–1465, p. 9.

[11] In *Hyland* v. *Procunier*, the District Court enjoined correctional officials from requiring a parolee to obtain advance permission for speeches to public gatherings. The opinion did not discuss the rights of prisoners. *Gilmore* v. *Lynch* concerned regulations limiting prisoner access to legal materials and mutual legal assistance. The decision rested on the prisoners' right to reasonable access to the courts. *Northern* v. *Nelson* upheld an inmate's right to receive a newspaper which was "necessary for effective exercise of plaintiff's right to practice the Muslim religion." 315 F. Supp., at 688. *Payne* v. *Whitmore* affirmed the inmates' First Amendment right to receive newspapers and magazines. The theory of the decision was that "prison rules must bear a reasonable relationship to valid prison goals, and rules which infringe upon particularly important rights will require a proportionately stronger justification." 325 F. Supp., at 1193. It contained no discussion concerning either the importance of prisoner correspondence

Whether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court, there was no "clearly established" First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971–1972.[12] As a matter of law, therefore, there was no basis for rejecting the immunity defense on the ground that petitioners knew or should have known that their alleged conduct violated a constitutional right. Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct "cannot reasonably be characterized as being in good faith." *Wood* v. *Strickland*, 420 U. S., at 322.[13]

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rights or the type of correspondence rules which would be reasonable. Toward the end of the relevant period, in May 1972, *Brenneman* v. *Madigan* held that pretrial detainees had a First Amendment right in their correspondence. The court recognized, however, that "[p]re-trial detainees do not stand on the same footing as convicted inmates." 343 F. Supp., at 142.

[12] Although some of the items of correspondence with which respondent claims interference concerned legal matters or were addressed to lawyers, respondent is foreclosed from asserting any claim with respect to mail interference based on infringement of his right of access to the courts because such a claim was dismissed with prejudice in an earlier phase of this case. Order of Feb. 9, 1973, No. C–72–1954 SW (ND Cal.). In his Points and Authorities Against Motion to Dismiss filed in connection with the present complaint on April 17, 1974, respondent stated that "[t]he claim against mail interference does not purport to allege denial of access to the courts," and explained that "[i]n ruling on defendants' previous Motion to Dismiss, in February, 1973, this Court dismissed plaintiff's claim against mail interference insofar as it alleged denial of access to the courts." Record 171.

[13] There is thus no occasion to address this case on the assumption that Navarette's mailing privileges were protected by a constitutional rule of which petitioners could reasonably have been expected to be aware in 1971 and 1972 and to inquire whether petitioners knew or should have known that their conduct was in violation of that constitutional proscription.

Neither should petitioners' immunity defense be overruled under the second branch of the *Wood* v. *Strickland* standard, which would authorize liability where the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." This part of the rule speaks of "intentional injury," contemplating that the actor intends the consequences of his conduct. See Restatement (Second) of Torts § 8A (1965). The third claim for relief with which we are concerned here, however, charges negligent conduct, which normally implies that although the actor has subjected the plaintiff to unreasonable risk, he did not intend the harm or injury that in fact resulted. See *id.*, at § 282 and Comment *d*. Claims 1 and 2 of the complaint alleged intentional and bad-faith conduct in disregard of Navarette's constitutional rights; but claim 3, as the court below understood it and as the parties have treated it, was limited to negligence. The prison officers were charged with negligent and inadvertent interference with the mail and the supervisory personnel with negligent failure to provide proper training. To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us.[14]

We accordingly conclude that the District Court was correct in entering summary judgment for petitioners on the third claim of relief and that the Court of Appeals erred in holding otherwise. The judgment of the Court of Appeals is

Reversed.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent because the Court's opinion departs from our practice of considering only the question upon which certiorari

[14] Because of the disposition of this case on immunity grounds, we do not address petitioners' other submissions: that § 1983 does not afford a remedy for negligent deprivation of constitutional rights and that state prisoners have no First and Fourteenth Amendment rights in their outgoing mail.

was granted or questions "fairly comprised therein." This Court's Rule 23 (1)(c). We agreed to consider only one question: "Whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?" The Court decides a different question: Whether the petitioners in this case are immune from § 1983 damages for the negligent conduct alleged in count three of Navarette's complaint. That question is not "comprised" within the question that we agreed to consider. Nor is this case within any "well-recognized exception" to our practice. See *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U. S. 313, 320 n. 6 (1971); R. Stern & E. Gressman, Supreme Court Practice § 6.37, p. 298 (4th ed. 1969).

The District Court granted summary judgment for the petitioners, without opinion, on a claim that petitioners confiscated Navarette's mail in the course of a negligent and inadvertent application of mail regulations. The meaning of that allegation is by no means clear. Navarette may have intended to allege that petitioners were aware of the nature of the mail and intentionally confiscated it because they did not understand prison regulations. Or it may be that Navarette intended to claim that petitioners, apart from their understanding of prison mail regulations, confiscated the mail because they were mistaken as to its nature. The Court of Appeals appears to have adopted the latter interpretation of the allegation although its opinion is not entirely clear. It described the pertinent cause of action as alleging acts "committed negligently." Having decided that the complaint alleged negligent acts, the Court of Appeals addressed the issue of whether a negligent act can give rise to § 1983 liability. It decided that "a deprivation of rights need not be purposeful to be actionable under § 1983" and held that Navarette's allegation "that state officers negligently deprived him of [his rights] state[s] a § 1983 cause of action."

The question before us is whether deprivation of a constitutional right by negligent conduct is actionable under § 1983.

Neither the language nor the legislative history of § 1983 indicates that Congress intended to provide remedies for negligent acts.

I would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim is not liable for damages under § 1983. I would then remand the case to the Court of Appeals to construe the ambiguous complaint and determine whether the allegation regarding misapplication of prison mail regulations states a § 1983 cause of action.

MR. JUSTICE STEVENS, dissenting.

Today's decision, coupled with *O'Connor* v. *Donaldson*, 422 U. S. 563, strongly implies that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability. As the immunity doctrine developed, the Court was careful to limit its holdings to specific officials,[1] and to insist that a considered inquiry into the common law was an essential precondition to the recognition of the proper immunity for any official.[2] These limits have now been abandoned. In *Donaldson*, without explanation and without reference to the common law, the Court held that the standard for judging the

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[1] Thus, in *Wood* v. *Strickland*, 420 U. S. 308, 322, the Court stated:

"Therefore, *in the specific context of school discipline*, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." (Emphasis added.)

[2] In *Imbler* v. *Pachtman*, 424 U. S. 409, 421, the Court stated:

"As noted above, our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."

immunity of the superintendent of a mental hospital is the same as the standard for school officials; today the Court purports to apply the same standard to the superintendent of a prison system and to various correction officers.[3]

I have no quarrel with the extension of a qualified immunity defense to all state agents. A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability. But when the Court makes the qualified immunity available to all potential defendants, it is especially important that the contours of this affirmative defense be explained with care and precision. Unfortunately, I believe today's opinion significantly changes the nature of the defense and overlooks the critical importance of carefully examining the factual basis for the defense in each case in which it is asserted.

The facts of this case have been developed only sketchily. Because the District Court granted a motion for summary judgment, we must accept Navarette's version of the facts as true.[4] The Court of Appeals remanded six of his claims for

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[3] Perhaps with good reason, see *Whirl* v. *Kern*, 407 F. 2d 781, 791–792 (CA5 1969), the Court does not consult the common law to gauge the scope of a jailer's immunity. Cf. *Imbler* v. *Pachtman*, *supra*, at 421; *Wood* v. *Strickland*, *supra*, at 318. Instead, the Court seems to rely on an unarticulated notion that prison administrators deserve as much immunity as Governors, school administrators, hospital administrators, and policemen. *Ante*, at 561, and n. 7. The Court also elides any distinction between discretionary and ministerial tasks. Cf. *Scheuer* v. *Rhodes*, 416 U. S. 232, 247. One defendant in this case was joined simply because he "was in charge of handling incoming and outgoing prisoner mail." Although the scope of this defendant's duties is not clear, he may well have been performing wholly ministerial chores, such as bagging and delivering prison mail. By allowing summary judgment in his favor, the Court strongly suggests that the nature of his job is irrelevant to whether he should have a good-faith immunity.

[4] For purposes of decision, the Court also makes an assumption about the law that applies to this case. Like the Court, I shall assume, without deciding, that a guard who negligently misreads regulations and improperly interferes with a prisoner's mail has violated § 1983.

trial. These claims tell us that prison officials prevented Navarette from corresponding with legal assistance groups, law students, the news media, personal friends, and other inmates with legal problems or expertise. Some of this mail was deliberately confiscated because the guards regarded Navarette as a troublesome "writ-writer" and some was mishandled simply because the guards were careless in performing their official duties.

To establish their defense, all the defendants except Procunier have filed an affidavit stating that they made a good-faith effort to comply with prison mail regulations while handling Navarette's mail.[5] But Navarette's affidavit challenges this assertion. According to Navarette, the prison warden took the position, despite contrary prison regulations, that officials had a right to confiscate any mail, "if we don't feel it is right or necessary." Record 78. Navarette also claims that his writ-writing activities led authorities to punish him by taking away his job as a prison librarian and by seizing his mail.

With the record in this state, the defendants have not established good faith. The heart of the good-faith defense is the manner in which the defendant has carried out his job.[6]

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[5] Procunier filed neither an answer nor an affidavit. The affidavit filed by the other defendants states:

"Insofar as I handled, approved, returned or otherwise dealt with the mail of Apolinar Navarette, such actions were at all times taken in good faith effort to comply with the applicable regulations then in force of the Director of the Department of Corrections or the superintendent of the institution. At no time did I maliciously interfere with or confiscate plaintiff's mail, or conspire with others to so act, in violation of applicable regulations." Record 142.

[6] This is the principle we have turned to in fashioning more specific rules. In *Wood* v. *Strickland*, *supra*, for example, the Court said that the goal of the good-faith doctrine is to allow officials to do their jobs faithfully without fear:

"[H]owever worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their

A public official is entitled to immunity for acts performed in the regular course of duty if he sincerely and reasonably believed he was acting within the sphere of his official responsibility. See *Scheuer* v. *Rhodes,* 416 U. S. 232, 247–248. The kind of evidence that will adequately support the defense will vary widely from case to case. Some defendants, especially those without policymaking responsibility, may establish their defense by showing that they abided by the institution's regulations or by its long-followed practices. Other officials, whose exercise of discretion is given greater deference by the courts, see *Scheuer* v. *Rhodes, supra,* may have a correspondingly greater duty to consider the legal implications of their conduct.

Wood v. *Strickland,* 420 U. S. 308, pointed out two specific instances in which an official might forfeit his good-faith defense by deviating from a reasonable performance of his job. An official does not carry out his official duties properly if he chooses a course of conduct that he knows, or should know, is unconstitutional. *Id.,* at 322. Similarly, an official steps outside his proper role when he uses his powers to inflict constitutional or other harm on an individual for reasons unrelated to the performance of his duty.[7] Selective and malicious enforcement of the law is not good faith.

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responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." 420 U. S., at 321.

[7] Referring to *Wood* v. *Strickland,* the Court in *O'Connor* v. *Donaldson,* 422 U. S. 563, 577, stated:

"Under that decision, the relevant question for the jury is whether O'Connor 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson].' [420 U. S.,] at 322."

Thus, both in *Wood* and in *O'Connor,* the Court expressly stated that the defendant would forfeit his qualified immunity if he acted with the

Under this standard, Navarette may well be able to defeat these defendants' affirmative defense of good faith. He has alleged, and therefore we must assume, that the defendants did not in fact act within the sphere of their accepted responsibilities. If they carelessly disregarded the standards which their superiors directed them to follow, they would be unable to make the threshold showing necessary to establish good faith. Whether or not that showing can be made in this case depends on a resolution of the conflict between Navarette's allegations of negligence and the statements in defendants' affidavit.

The defendants fare no better if we limit our attention to the two examples of bad faith set out in *Wood* v. *Strickland*, *supra*. The *Wood* Court stated that actual malice—the intent to cause constitutional or other injury—cannot be good faith; a defendant may not have the benefit of the good-faith defense if he misuses his powers by singling out the plaintiff for special and unfair injuries.[8] In this case, malice is alleged in some of the plaintiff's claims, and we must assume that it can be proved. The evidence might show that the defendants intentionally confiscated some of Navarette's mail as a punishment and that they negligently mislaid other letters. A jury might then find that the defendants' animus toward Navarette so tainted their handling of his mail that the good-faith defense should be denied them even with respect to harm caused by their negligence. Only by qualifying its previous teaching about this defense can the Court regard evidence of the defendants' ill will toward the plaintiff as totally irrelevant to any claim that he may have for harm caused by the negligent performance of their duties.

The *Wood* Court also noted that a plaintiff may successfully rebut a claim of immunity based on the defendant's good-

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malicious intention to cause a deprivation of constitutional rights or if he deliberately intended to cause "other injury."

[8] See n. 7, *supra*.

faith performance of official duties by demonstrating that the defendant knew, or should have known, that he was acting unconstitutionally. I think the Court is correct in concluding that the First Amendment's applicability to an inmate's correspondence was not so well established in 1971 that the defendants should have known that interfering with a prisoner's routine mail was unconstitutional. That does not, however, foreclose the argument that the official neglect alleged in this case implicated a different constitutional right—the prisoner's right of access to the courts. In 1971, Navarette had a well-established right of access to the courts and to legal assistance.[9] Cutting off his communications with law students and legal assistance groups violated this right. While the lower echelon employees may have been under no obligation to read advance sheets, a jury might conclude that

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[9] Access to the courts through the mails has been constitutionally protected since 1941, when *Ex parte Hull*, 312 U. S. 546, held that the State could not constitutionally refuse to mail a prisoner's inartful pleadings to the courts. In *Johnson* v. *Avery*, 393 U. S. 483, this Court recognized that the right of access to the courts included a right of access to legal assistance. *Johnson* held that, in the absence of alternative sources of assistance, prisoners must be allowed to consult inmate "writ-writers." *Id.*, at 490. In *Younger* v. *Gilmore*, 404 U. S. 15, this Court summarily affirmed a three-judge court decision ordering the California Department of Corrections to heed the *Johnson* decision and abandon a prison rule making it difficult for inmates to get legal help from writ-writers. See *Gilmore* v. *Lynch*, 319 F. Supp. 105, 112 (ND Cal. 1970). By the time of the acts in question here, the right of access to the courts clearly included a right to communicate with legal assistance groups and law students:

"Johnson v. Avery clearly stands for the general proposition that an inmate's right of access to the court involves a corollary right to obtain some assistance in preparing his communication with the court. Given that corollary right, we fail to see how a state, at least in the absence of some countervailing interest not here appearing, can prevent an inmate from seeking legal assistance from bona fide attorneys working in an organization such as the Civil Liberties Union." *Nolan* v. *Scafati*, 430 F. 2d 548, 551 (CA1 1970) (footnote omitted).

at least some of these defendants should have known that at least some of Navarette's mail was entitled to constitutional protection.[10] Certainly the question whether correction officers should be charged with knowledge of a constitutional right to communicate with law students and legal assistance groups could be better answered after, rather than before, trial. Cf. *O'Connor* v. *Donaldson*, 422 U. S., at 576–577; *Donaldson* v. *O'Connor*, 519 F. 2d 59 (CA5 1975).

In sum, I am persuaded that the Court has acted unwisely in reaching out to decide the merits of an affirmative defense before any evidence has been heard and that the record as now developed does not completely foreclose the possibility that the plaintiff might be able to disprove a good-faith defense that has not yet even been pleaded properly.[11]

Accordingly, I respectfully dissent from the decision to decide a question which is not properly presented and from the way the Court decides that question.

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[10] Although Navarette no longer relies on his access rights to establish the defendants' liability, *ante*, at 565 n. 12, he surely may attempt to prove a violation of these rights to rebut a claim of good faith.

[11] The license the Court has taken with normal pleading requirements is perhaps best illustrated by the grant of immunity to the defendant Procunier, the Director of the State Department of Corrections, who has filed neither an answer nor an affidavit. For all the record shows, Procunier may have been expressly advised by counsel that the mail regulations were being unconstitutionally enforced, and despite that advice he may have deliberately instructed his subordinates to punish this uniquely bothersome writ-writer. Even such a remote possibility must be considered before summary judgment is approved. As Judge Aldrich has put it, "even an andabata holds the field until someone comes forward to defeat him." *Mack* v. *Cape Elizabeth School Bd.*, 553 F. 2d 720, 722 (CA1 1977).

Syllabus

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC. *v.* PONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76–1346. Argued December 6, 1977—Decided February 22, 1978

In a private civil action for lost wages under the Age Discrimination in Employment Act of 1967 (ADEA), a trial by jury is available where sought by one of the parties, since, although the ADEA contains no provision expressly granting a right to jury trial in such cases, the ADEA's structure demonstrates a congressional intent to grant such a right. Pp. 577–585.

(a) The directive of § 7 (b) of the ADEA that the Act be enforced in accordance with the "powers, remedies, and *procedures*" of the Fair Labor Standards Act (FLSA) is a significant indication of Congress' intent. Long before the ADEA was enacted, courts had uniformly interpreted the FLSA to afford a right to jury trial in private actions pursuant to that Act. Congress can be presumed to have been aware of that interpretation and by incorporating certain remedial and procedural provisions of the FLSA into the ADEA, Congress demonstrated its intention to afford a right to jury trial. Pp. 580–582.

(b) By directing in § 7 (b) of the ADEA that actions for lost wages be treated as actions for unpaid minimum wages or overtime compensation under the FLSA, Congress dictated that the jury trial right then available to enforce that FLSA liability would also be available in private actions under the ADEA. This conclusion is supported by the language of § 7 (b) empowering a court to grant "*legal* or equitable relief" and of § 7 (c) authorizing individuals to bring actions for "*legal* or equitable relief." It can be inferred that Congress knew the significance of the term "legal" and that by providing specifically for "legal" relief, it intended that there would be a jury trial on demand to enforce liability for amounts deemed to be unpaid minimum wages or overtime compensation. Pp. 582–583.

(c) A contrary congressional intent cannot be found by comparing the ADEA with Title VII of the Civil Rights Act of 1964. Assuming, *arguendo*, that Congress did not intend that there be jury trials in private actions under Title VII, there is a material difference between the ADEA and Title VII. In contrast to the ADEA, Title VII does not, in so many words, authorize "legal" relief, and the availability of

backpay is a matter of equitable discretion. It appears, moreover, that Congress rejected the course of adopting Title VII procedures for ADEA actions in favor of incorporating the FLSA procedures. Pp. 583–585.

549 F. 2d 950, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN, J., who took no part in the consideration or decision of the case.

Thornton H. Brooks argued the cause for petitioner. With him on the brief was *M. Daniel McGinn.*

Norman B. Smith argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether there is a right to a jury trial in private civil actions for lost wages under the Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, as amended, 88 Stat. 74, 29 U. S. C. § 621 *et seq.* (1970 ed. and Supp. V). Respondent commenced this action against petitioner, her former employer, alleging that she had been discharged because of her age in violation of the ADEA. She sought reinstatement, lost wages, liquidated damages, attorney's fees, and costs. Respondent demanded a jury trial on all issues of fact; petitioner moved to strike the demand. The District Court granted the motion to strike but certified the issue for interlocutory appeal pursuant to 28 U. S. C. § 1292 (b). The United States Court of Appeals for the Fourth Circuit allowed the appeal and vacated the trial court's order, ruling that the ADEA and the Seventh Amendment [1]

**Robert E. Williams* and *Frank C. Morris, Jr.*, filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Jonathan A. Weiss filed a brief for Legal Services for the Elderly Poor as *amicus curiae* urging affirmance.

[1] Judge Butzner filed an opinion concurring specially. Since he agreed with the court that the statute entitled respondent to a jury trial, he found no occasion to address the constitutional issue. 549 F. 2d 950, 954 (1977).

afford respondent the right to a jury trial on her claim for lost wages, 549 F. 2d 950, 952–953 (1977).[2] We granted certiorari, 433 U. S. 907 (1977), to resolve the conflict in the Circuits[3] on this important issue in the administration of the ADEA. We now affirm.

I

The ADEA broadly prohibits arbitrary discrimination in the workplace based on age. § 4 (a), 29 U. S. C. § 623 (a). Although the ADEA contains no provision expressly granting a right to jury trial, respondent nonetheless contends that the structure of the Act demonstrates a congressional intent to grant such a right. Alternatively, she argues that the Seventh Amendment requires that in a private action for lost wages under the ADEA, the parties must be given the option of having the case heard by a jury. We turn first to the statutory question since " 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' " *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971), quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *Pernell* v. *Southall Realty*, 416 U. S. 363, 365 (1974). Because we find the statutory issue dispositive, we need not address the constitutional issue.

The enforcement scheme for the statute is complex—the product of considerable attention during the legislative debates

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[2] The Court of Appeals did not decide whether respondent was entitled to a jury trial on her claim for liquidated damages because according to the District Court opinion, respondent had "conceded that the liquidated damages issue would not be triable to a jury." 69 F. R. D. 576 n. 2 (1976). We express no view on the issue of the right to jury trial on a liquidated damages claim.

[3] *Morelock* v. *NCR Corp.*, 546 F. 2d 682 (CA6 1976) (no right to jury trial), cert. pending, No. 77–172; *Rogers* v. *Exxon Research & Engineering Co.*, 550 F. 2d 834 (CA3 1977) (right to jury trial), cert. denied, *post*, p. 1022.

preceding passage of the Act. Several alternative proposals were considered by Congress. The Administration submitted a bill, modeled after §§ 10 (c), (e) of the National Labor Relations Act, 29 U. S. C. §§ 160 (c), (e), which would have granted power to the Secretary of Labor to issue cease-and-desist orders enforceable in the courts of appeals, but would not have granted a private right of action to aggrieved individuals, S. 830, H. R. 4221, 90th Cong., 1st Sess. (1967). Senator Javits introduced an alternative proposal to make discrimination based on age unlawful under the Fair Labor Standards Act (FLSA), 29 U. S. C. § 201 *et seq.*; the normal enforcement provisions of the FLSA, 29 U. S. C. § 216 *et seq.* (1970 ed. and Supp. V), then would have been applicable, permitting suits by either the Secretary of Labor or the injured individual, S. 788, 90th Cong., 1st Sess. (1967). A third alternative that was considered would have adopted the statutory pattern of Title VII of the Civil Rights Act of 1964 and utilized the Equal Employment Opportunity Commission. 42 U. S. C. §§ 2000e–4, 2000e–5 (1970 ed. and Supp. V).

The bill that was ultimately enacted is something of a hybrid, reflecting, on the one hand, Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the pre-existing schemes.[4] Pursuant to § 7 (b) of the Act, 29 U. S. C. § 626 (b), violations of the ADEA generally are to be treated as violations of the FLSA. "Amounts owing . . . as a result of a violation" of the ADEA are to be treated as "unpaid minimum

[4] Hearings on S. 830, S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 24 (1967) (remarks of Sen. Javits); *id.*, at 29 (remarks of Sen. Smathers); *id.*, at 396 (statement of National Retail Merchants Assn.). Hearings on H. R. 3651, H. R. 3768, and H. R. 4221 before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., 12–13 (1967) (remarks of Secretary of Labor); *id.*, at 413 (statement of Legislative Representative, AFL–CIO).

wages or unpaid overtime compensation" under the FLSA and the rights created by the ADEA are to be "enforced in accordance with the powers, remedies and procedures" of specified sections of the FLSA. 29 U. S. C. § 626 (b).[5]

Following the model of the FLSA, the ADEA establishes two primary enforcement mechanisms. Under the FLSA provisions incorporated in § 7 (b) of the ADEA, 29 U. S. C. § 626 (b), the Secretary of Labor may bring suit on behalf of an aggrieved individual for injunctive and monetary relief. 29 U. S. C. §§ 216 (c), 217 (1970 ed. and Supp. V). The incorporated FLSA provisions together with § 7 (c) of the ADEA, 29 U. S. C. § 626 (c), in addition, authorize private civil actions for "such legal or equitable relief as will effectuate the purposes of" the ADEA.[6] Although not required by the

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[5] Section 7 (b), as set forth in 29 U. S. C. § 626 (b), provides:

"The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211 (b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

[6] Section 7 (c), as set forth in 29 U. S. C. § 626 (c), provides:

"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring

FLSA, prior to the initiation of any ADEA action, an individual must give notice to the Secretary of Labor of his intention to sue in order that the Secretary can attempt to eliminate the alleged unlawful practice through informal methods. § 7 (d), 29 U. S. C. § 626 (d). After allowing the Secretary 60 days to conciliate the alleged unlawful practice, the individual may file suit. The right of the individual to sue on his own terminates, however, if the Secretary commences an action on his behalf. § 7 (c), 29 U. S. C. § 626 (c).

II

Looking first to the procedural provisions of the statute, we find a significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the "powers, remedies, and *procedures*" of the FLSA. § 7 (b), 29 U. S. C. § 626 (b) (emphasis added). Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held.[7] Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 n. 8 (1975); *NLRB* v. *Gullett Gin*

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such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter."

[7] See, *e. g.*, *Wirtz* v. *Jones*, 340 F. 2d 901, 904 (CA5 1965); *Lewis* v. *Times Publishing Co.*, 185 F. 2d 457 (CA5 1950); *Olearchick* v. *American Steel Foundries*, 73 F. Supp. 273, 279 (WD Pa. 1947). See also Note, The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts, 44 U. Chi. L. Rev. 365, 376 (1977); Note, Fair Labor Standards Act and Trial by Jury, 65 Colum. L. Rev. 514 (1965). However, no right to jury trial was recognized in actions brought by the Secretary of Labor enjoining violations of the FLSA and compelling employers to pay unlawfully withheld minimum wages or overtime compensation pursuant to 29 U. S. C. § 217. See, *e. g.*, *Sullivan* v. *Wirtz*, 359 F. 2d 426 (CA5 1966); *Wirtz* v. *Jones*, *supra*.

Co., 340 U. S. 361, 366 (1951); *National Lead Co.* v. *United States*, 252 U. S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation. For example, in construing the enforcement sections of the FLSA, the courts had consistently declared that injunctive relief was not available in suits by private individuals but only in suits by the Secretary. *Powell* v. *Washington Post Co.*, 105 U. S. App. D. C. 374, 267 F. 2d 651 (1959); *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958, 963 (CA2 1946); *Bowe* v. *Judson C. Burns, Inc.*, 137 F. 2d 37 (CA3 1943). Congress made plain its decision to follow a different course in the ADEA by expressly permitting "such . . . equitable relief as may be appropriate to effectuate the purposes of [the ADEA] including without limitation judgments compelling employment, reinstatement or promotion" "in *any* action brought to enforce" the Act. § 7 (b), 29 U. S. C. § 626 (b) (emphasis added). Similarly, while incorporating into the ADEA the FLSA provisions authorizing awards of liquidated damages, Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful.[8] Finally,

[8] By its terms, 29 U. S. C. § 216 (b) requires that liquidated damages be awarded as a matter of right for violations of the FLSA. However, in response to its dissatisfaction with that judicial interpretation of the provision, Congress enacted the Portal-to-Portal Pay Act of 1947, 61 Stat. 84, which, *inter alia*, grants courts authority to deny or limit liquidated damages where the "employer shows to the satisfaction of the court that

Congress expressly declined to incorporate into the ADEA the criminal penalties established for violations of the FLSA.[9]

This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA. Senator Javits, one of the floor managers of the bill, so indicated in describing the enforcement section which became part of the Act: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]." 113 Cong. Rec. 31254 (1967).[10] And by directing that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA, § 7 (b), 29 U. S. C. § 626 (b), Congress dictated that the jury trial right then available to

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the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of" the FLSA, § 11, 29 U. S. C. § 260 (1970 ed., Supp. V). Although § 7 (e) of the ADEA, 29 U. S. C. § 626 (e), expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act, 29 U. S. C. §§ 255 and 259 (1970 ed. and Supp. V), the ADEA does not make any reference to § 11, 29 U. S. C. § 260 (1970 ed., Supp. V).

[9] Section 10 of the ADEA, 29 U. S. C. § 629, establishes criminal penalties for interference with the performance of an authorized representative of the Secretary when he is engaged in the performance of his duties under the Act. Cf. 29 U. S. C. § 216 (a).

[10] Senator Javits made the only specific reference in the legislative history to a jury trial. He said:

"The whole test is somewhat like the test in an accident case—did the person use reasonable care. A jury will answer yes or no. The question here is: Was the individual discriminated against solely because of his age? The alleged discrimination must be proved and the burden of proof is upon the one who would assert that that was actually the case." 113 Cong. Rec. 31255 (1967).

It is difficult to tell whether Senator Javits was referring to the issue in ADEA cases or in accident cases when he said the jury will say yes or no.

enforce that FLSA liability would also be available in private actions under the ADEA.

This inference is buttressed by an examination of the language Congress chose to describe the available remedies under the ADEA. Section 7 (b), 29 U. S. C. § 626 (b), empowers a court to grant *"legal* or equitable relief" and § 7 (c), 29 U. S. C. § 626 (c), authorizes individuals to bring actions for *"legal* or equitable relief" (emphases added). The word "legal" is a term of art: In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial. See *Curtis* v. *Loether,* 415 U. S. 189, 195–196 (1974). "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil* v. *United States,* 221 U. S. 1, 59 (1911). See *Gilbert* v. *United States,* 370 U. S. 650, 655 (1962); *Montclair* v. *Ramsdell,* 107 U. S. 147, 152 (1883). We can infer, therefore, that by providing specifically for "legal" relief, Congress knew the significance of the term "legal," and intended that there would be a jury trial on demand to "enforc[e] . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." § 7 (b), 29 U. S. C. § 626 (b).[11]

Petitioner strives to find a contrary congressional intent by comparing the ADEA with Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V), which petitioner maintains does not provide for jury trials. We, of course, intimate no view as to whether a jury trial is

[11] Section 7 (b), 29 U. S. C. § 626 (b), does not specify which of the listed categories of relief are legal and which are equitable. However, since it is clear that judgments compelling "employment, reinstatement or promotion" are equitable, see 5 J. Moore, Federal Practice ¶ 38.21 (1977), Congress must have meant the phrase "legal relief" to refer to judgments "enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation."

available under Title VII as a matter of either statutory or constitutional right. See *Curtis* v. *Loether*, *supra*, at 197. However, after examining the provisions of Title VII, we find petitioner's argument by analogy to Title VII unavailing. There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII.[12] But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.

Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII. Compare § 7 (b), 29 U. S. C. § 626 (b), with 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. V). Similarly, the ADEA incorporates the FLSA provision that employers "shall be liable" for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion, see *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421.[13] Finally, rather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course

[12] Title VII with respect to race, color, religion, sex, or national origin, and the ADEA with respect to age make it unlawful for an employer "to fail or refuse to hire or to discharge any individual," or otherwise to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," on any of those bases. 42 U. S. C. § 2000e–2 (a)(1); 29 U. S. C. § 623 (a)(1). Compare 42 U. S. C. § 2000e–2 (a)(2) (1970 ed., Supp. V) with 29 U. S. C. § 623 (a)(2).

[13] Although we have held that the discretionary power to deny backpay should be used only where to do so "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421, we nonetheless have recognized that under Title VII some discretion exists.

in favor of incorporating the FLSA procedures even while adopting Title VII's substantive prohibitions. Thus, even if petitioner is correct that Congress did not intend there to be jury trials under Title VII, that fact sheds no light on congressional intent under the ADEA. Petitioner's reliance on Title VII, therefore, is misplaced.[14]

We are not unmindful of the difficulty of discerning congressional intent where the statute provides no express answer. However, we cannot assume, in the face of Congress' extensive knowledge of the operation of the FLSA, illustrated by its selective incorporation and amendment of the FLSA provisions for the ADEA, that Congress was unaware that courts had uniformly afforded jury trials under the FLSA. Nor can we believe that in using the word "legal," Congress was oblivious to its long-established meaning or its significance. We are therefore persuaded that Congress intended that in a private action under the ADEA a trial by jury would be available where sought by one of the parties. The judgment of the Court of Appeals is, accordingly,

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

[14] Indeed, to the extent petitioner correctly interprets congressional intent with respect to jury trials under Title VII, the very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind in drafting the later law.

J. W. BATESON CO., INC., ET AL. *v.* UNITED STATES EX REL. BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1476. Argued November 30, 1977—Decided February 22, 1978

Petitioner prime contractor (Bateson) entered into a Government contract for construction of a hospital addition and posted a payment bond as required by the Miller Act to protect those who have a direct contractual relationship with either the prime contractor or a "subcontractor." Bateson then subcontracted a portion of the work to a firm (Pierce) which in turn subcontracted with another firm (Colquitt) for installation of a sprinkler system. When Colquitt failed to pay over amounts withheld from its employees' wages for union dues, vacation savings, and various union trust funds, as required by a collective-bargaining agreement with respondent union, the union and respondent trustees filed suit against Bateson in the name of the United States for the amount claimed due under the payment bond. The District Court granted summary judgment for respondents, and the Court of Appeals affirmed, holding that although Colquitt was "technically a sub-subcontractor," nevertheless it should be considered a "subcontractor" for purposes of payment bond recovery by its employees or their representatives, since it was performing "an integral and significant part of [Bateson's] contract" with the Government. *Held:* Colquitt's employees were not protected by the Miller Act payment bond, since they did not have a contractual relationship either with Bateson or with Pierce or any other "subcontractor" and since Colquitt cannot be considered a "subcontractor." *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U. S. 102, and *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, distinguished. As confirmed by the Miller Act's legislative history, the word "subcontractor" as used in the Act must be construed as being limited to meaning one who contracts with a prime contractor. Pp. 589–594.

179 U. S. App. D. C. 325, 551 F. 2d 1284, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J.,

and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 595. BLACKMUN, J., took no part in the consideration or decision of the case.

Jack Rephan argued the cause and filed briefs for petitioners.

Donald J. Capuano argued the cause for respondent. With him on the brief was *Patrick C. O'Donoghue*.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under the Miller Act, 49 Stat. 793, as amended, 80 Stat. 1139, 40 U. S. C. § 270a *et seq.*, a prime contractor on a federal construction project involving over $2,000 must post a payment bond to protect those who have a direct contractual relationship with either the prime contractor or a "subcontractor." The issue in this case is whether the term "subcontractor," as used in the Act, encompasses a firm that is technically a "sub-subcontractor."

The material facts are not in dispute. Petitioner J. W. Bateson Co. entered into a contract with the United States for construction of an addition to a hospital and provided a payment bond signed by Bateson's president and by representatives of petitioner sureties. Bateson, the prime contractor, subcontracted with Pierce Associates for a portion of the original work, and Pierce in turn subcontracted with Colquitt Sprinkler Co. for the installation of a sprinkler system, one of the items specified in the contract between Bateson and the United States. Under a collective-bargaining agreement with respondent Road Sprinkler Fitters Local Union No. 669, Colquitt was obligated to pay over amounts withheld from employees' wages for union dues and vacation savings, and to contribute to the union's welfare, pension, and educational trust funds. When Colquitt failed to make any of these pay-

*Briefs of *amici curiae* urging reversal were filed by *Kahl K. Spriggs* for the Associated General Contractors of America; and by *James V. Dolan* for the Surety Association of America et al.

ments by the end of the union members' employment with the firm, the union and respondent trustees notified Bateson of the amount that they claimed was due them under the payment bond and then filed suit against Bateson in the name of the United States.

The District Court granted summary judgment for respondents, and the Court of Appeals for the District of Columbia Circuit affirmed, 179 U. S. App. D. C. 325, 551 F. 2d 1284 (1977). The appellate court recognized that Colquitt, which had a contractual relationship with Pierce but not with Bateson, was "technically a sub-subcontractor," but it concluded nevertheless that Colquitt should be considered a "subcontractor" for purposes of payment bond recovery by its employees or their representatives. *Id.*, at 327, 551 F. 2d, at 1286.[1] Applying a functional test based on the "substantial[ity] and importan[ce]" of the relationship between Bateson and Colquitt, the court noted that Colquitt was performing on the jobsite "an integral and significant part of [Bateson's] contract" with the Government, that the work "was performed over a substantial period of time," that Bateson had access to Colquitt's payroll records, and that Bateson could have protected itself "through bond or otherwise" against Colquitt's default. *Ibid.*, 551 F. 2d, at 1286.

We granted certiorari, 433 U. S. 907 (1977), to resolve a conflict between the decision below and the holdings of at least three other Circuits.[2] We now reverse.

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[1] The right of trustees of union trust funds to assert a claim against a Miller Act payment bond on behalf of employees was established in *United States ex rel. Sherman* v. *Carter*, 353 U. S. 210, 218–220 (1957). That case also held that amounts which the employer agreed to contribute to union trust funds could be recovered by the employees or their representatives under the payment bond. See *id.*, at 217–218.

[2] *United States ex rel. Powers Regulator Co.* v. *Hartford Accident & Indemnity Co.*, 376 F. 2d 811 (CA1 1967); *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Frederick Raff Co.*, 271 F. 2d 415 (CA1 1959); *Fidelity & Deposit Co.* v. *Harris*, 360 F. 2d 402, 407–409 (CA9

Like the predecessor Heard Act, Act of Aug. 13, 1894, ch. 280, 28 Stat. 278, as amended, Act of Feb. 24, 1905, 33 Stat. 811, the Miller Act was designed to provide an alternative remedy to the mechanics' liens ordinarily available on private construction projects. *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 122 (1974). Because "a lien cannot attach to Government property," persons supplying labor or materials on a federal construction project were to be protected by a payment bond. *Id.*, at 121–122. The scope of the Miller Act's protection is limited, however, by a proviso in § 2 (a) of the Act that "had no counterpart in the Heard Act." *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U. S. 102, 107 (1944). This proviso has the effect of requiring that persons who lack a "contractual relationship express or implied with the [prime] contractor" show a "direct contractual relationship with a subcontractor" in order to recover on the bond. 40 U. S. C. § 270b (a);[3] see *F. D. Rich Co.* v. *United States ex rel.*

1966); *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F. 2d 89 (CA5), cert. denied, 363 U. S. 843 (1960). See also *United States ex rel. DuKane Corp.* v. *United States Fidelity & Guaranty Co.*, 422 F. 2d 597, 599–600, and n. 4 (CA4 1970).

[3] Section 2 (a) of the Miller Act, as set forth in 40 U. S. C. § 270b (a), provides in full:

"Every person who has furnished labor or material in the prosecution of the work provided for in [the] contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such

Industrial Lumber Co., supra, at 122; *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co., supra,* at 107–108. In the instant case it is conceded that Colquitt's employees enjoyed no contractual relationship, "express or implied," with Bateson, and that they did have a "direct contractual relationship" with Colquitt. The question before us, then, is whether Colquitt can be considered a "subcontractor."

As we observed in *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co., supra,* Congress used the word "subcontractor" in the Miller Act in accordance with "usage in the building trades." 322 U. S., at 108–109; see *id.,* at 110. In the building trades,

> "a subcontractor is one who *performs for and takes from the prime contractor* a specific part of the labor or material requirements of the original contract . . . ." *Id.,* at 109 (emphasis added).

It thus appears that a contract with a prime contractor is a prerequisite to being a "subcontractor." [4]

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person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop[e] addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

[4] The structure of the § 2 (a) proviso as it relates to notice lends further support to this view. Under the proviso, those having a claim against a "subcontractor" must give written notice to the prime contractor within 90 days of completing work on the job in order to recover against the payment bond. 40 U. S. C. § 270b (a); see n. 3, *supra.* This requirement "permits the prime contractor, after waiting ninety days, safely to pay his subcontractors without fear of additional liability to subsubcontractors or materialmen." *United States ex rel. Munroe-Lang-Stroth, Inc.* v. *Praught,* 270 F. 2d 235, 238 (CA1 1959). The notice provision thus prevents both "double payments" by prime contractors and

This interpretation of the Act's language is confirmed by the legislative history, which leaves no room for doubt about Congress' intent. While relatively brief, the authoritative Committee Reports of both the House of Representatives and the Senate squarely focus on the question at issue here:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H. R. Rep. No. 1263, 74th Cong., 1st Sess., 3 (1935); S. Rep. No. 1238, 74th Cong., 1st Sess., 2 (1935).

This passage indicates both that Congress understood the difference between "sub-subcontractors" like Colquitt and "subcontractors" like Pierce, and that it intended the scope of protection of a payment bond to extend no further than to sub-subcontractors. See *MacEvoy*, 322 U. S., at 107–108, and n. 5. There is nothing to the contrary anywhere in the legislative history. Thus, while Colquitt could have claimed

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the alternative of "interminable delay in settlements between contractors and subcontractors." *United States ex rel. J. A. Edwards & Co.* v. *Thompson Construction Corp.*, 273 F. 2d 873, 875–876 (CA2 1959), cert. denied, 362 U. S. 951 (1960).

If the term "subcontractor" in the proviso had been meant to include sub-subcontractors like Colquitt, it seems likely that notice would have been required, not only to the prime contractor, but also to intermediate subcontractors like Pierce. The prime contractor or his surety, while having initial responsibility for payment of the claimant, would probably in turn either withhold that amount from, or file a claim against, a bond or indemnity furnished by, the intermediate subcontractor. (Here, for example, it appears that Pierce had agreed to indemnify Bateson against such losses. Brief for Petitioners 18 n. 15.) Hence notice to the intermediate subcontractor would serve the same purpose as does notice to the prime contractor: prevention of double payments (*e. g.*, Pierce making full payment to Colquitt, then having to indemnify Bateson for amounts owed by Colquitt to its employees) or delayed settlements.

against the payment bond had Pierce defaulted in its obligations, the employees of Colquitt were not similarly protected against Colquitt's default, because they did not have a contractual relationship with Pierce or any other "subcontractor." [5]

This view of what was intended in the Miller Act is reinforced by the fact that all reported decisions that have considered the question, except that of the court below and one early District Court decision, have reached the same conclusion.[6] Presumably aware of this well-settled body of law

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[5] We note that Colquitt's employees also would not have been protected under the mechanic's lien statutes of many States. See *supra*, at 589. While these statutes have always varied widely, it appears that a large number of States, including some of the most commercially significant States, have restricted mechanics' liens to persons dealing directly with the prime contractor or with a subcontractor who dealt with the prime contractor. See, *e. g.*, *Battista* v. *Horton, Myers & Raymond*, 76 U. S. App. D. C. 1, 3, 128 F. 2d 29, 31 (1942) (District of Columbia mechanic's lien statute); *Wynkoop* v. *People*, 1 App. Div. 2d 620, 153 N. Y. S. 2d 836 (1956), summarily aff'd, 4 N. Y. 2d 892, 150 N. E. 2d 771 (1958) (New York statute restricting mechanics' liens to those "performing labor for or furnishing materials to a contractor [or] his subcontractor"). See generally Note, Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale L. J. 138, 147–148 (1958).

[6] See cases cited in n. 2, *supra*; *Aetna Ins. Co.* v. *Southern, Waldrip & Harvick*, 198 F. Supp. 505 (ND Cal. 1961); *United States ex rel. Whitmore Oxygen Co.* v. *Idaho Crane & Rigging Co.*, 193 F. Supp. 802 (Idaho 1961); *United States ex rel. Jonathan Handy Co.* v. *Deschenes Construction Co.*, 188 F. Supp. 270 (Mass. 1960); *United States ex rel. Newport News Shipbuilding & Dry Dock Co.* v. *Blount Bros. Construction Co.*, 168 F. Supp. 407 (Md. 1958). Contra, *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, 150 F. Supp. 323 (MD Pa. 1957). See also H. Cohen, Public Construction Contracts and the Law § 7.9, p. 208 (1961); 8 J. McBride & I. Wachtel, Government Contracts § 49.320 [2] (1977); R. Shealey, Law of Government Contracts § 143A, p. 187 (3d ed. 1938); Forster & DeBenedictis, Construction Contracts in Government Contracts Practice § 14.13, pp. 683–684 (1964); Stickells, Bonds of Contractors on Federal Public Works: The Miller Act, 36 B. U. L. Rev. 499, 512–516 (1956); Note, *supra*, n. 5, at 164.

dating back almost 20 years, Congress has never moved to modify the Act's coverage. As a result, all of those concerned with Government projects—prime contractors, sureties, various levels of subcontractors and their employees—have been led to assume that the employees of a sub-subcontractor would not be protected by the Miller Act payment bond and to order their affairs accordingly.[7] In the absence of some clear indication to the contrary, we should not defeat these reasonable expectations, particularly in view of the importance of certainty with regard to bonding practices on Government construction projects. See generally *MacEvoy*, *supra*, at 110–111.

In reaching a result contrary to that of other Courts of Appeals, the court below did not address itself either to the legislative history quoted above or to the conflict among the Circuits that its ruling created. Instead, it focused primarily on the substantiality and importance of the relationship between Colquitt and Bateson, see *supra*, at 588, relying for this approach on our decisions in *MacEvoy* and *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.* While those cases did involve the scope of the term "subcontractor" in the § 2 (a) proviso, they arose in situations in which the

[7] In the instant case, it appears that all of the affected parties arranged their affairs on the assumption that Colquitt's employees would not be covered by the payment bond. Bateson required an indemnity agreement from Pierce, Brief for Petitioners 18 n. 15, doubtless in part to protect Bateson from claims against the payment bond made by those contracting with Pierce. But Pierce did not require a similar agreement from Colquitt, *ibid.*, presumably because Pierce did not think that Colquitt's employees, on Colquitt's default, would have recourse against Bateson's payment bond. Finally, the agreement between Colquitt and the union contained a provision, which the union ultimately chose not to enforce, requiring Colquitt to post a bond to guarantee the various payments that it was required to make to the union and its trust funds. App. 13; see *id.*, at 49 (affidavit of union trustee).

firm at issue, unlike Colquitt, had a direct contractual relationship with the prime contractor. The question in both cases was whether a supplier of materials to the prime contractor could be considered a "subcontractor," [8] and on this question an absence of dispositive statutory language and legislative history led the Court ultimately to look to "functional" considerations. 417 U. S., at 123–124; see 322 U. S., at 110–111. In the instant case, by contrast, the traditional tools of statutory construction provide a definitive answer to the question before us, and hence it would be inappropriate to utilize the approach relied on by the Court of Appeals.

In concluding that the word "subcontractor" must be limited in meaning to one who contracts with a prime contractor, we are not unmindful of our obligation to construe the "highly remedial" Miller Act "liberal[ly] . . . in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." *MacEvoy, supra,* at 107. As we wrote in *MacEvoy,* however, "such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. . . . [W]e cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of § 2 (a)." 322 U. S., at 107. It was Congress that drew a line between sub-subcontractors and those in "more remote relationships" to the prime contractor. H. R. Rep. No. 1263, *supra,* at 3; S. Rep. No. 1238, *supra,* at 2; *MacEvoy, supra,* at 108; *Rich,* 417 U. S., at 122. If the scope of protection afforded by a Miller Act payment bond is to be extended, it is Congress that must make the change.

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[8] In *MacEvoy* we held that a firm which had merely supplied materials to the prime contractor could not be considered a "subcontractor." In *Rich* we concluded that a firm which had contracted with the prime contractor both to install certain items in a housing project and to supply materials for the project was a "subcontractor."

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court's narrow reading of the word "subcontractor" creates a system of protection for construction workers that I cannot believe Congress intended. It drives a wedge between employees working side by side on tasks equally vital to "the prosecution of the work." 40 U. S. C. § 270a (a)(2). Under the Court's reading, those who work for the general contractor or for a "first-tier" subcontractor are protected by the bond; those who work for other subcontractors are unprotected.

The Court's construction of the statute derives strong support from the statement in the Committee Reports distinguishing between "sub-subcontractors" and "more remote relationships." Nevertheless, I am persuaded that contrary evidence of congressional intent outweighs the isolated statement upon which the Court's decision primarily rests. I shall therefore first explain why I think the Act protects every person who has supplied labor or material in the prosecution of the work provided for in the prime contract. Thereafter, I shall explain why I believe the excerpt from the Committee Reports does not compel a contrary conclusion.

I

The Miller Act, like the Heard Act which preceded it, covers "all persons supplying labor and material in the prosecution of the work provided for in [a federal construction] contract." [1]

[1] 40 U. S. C. § 270a (a)(2). Almost identical language in the Heard Act covered "all persons supplying [a contractor or contractors] labor

Unless this language were to be narrowly read to cover only persons supplying labor or materials directly to the general contractor—and no one suggests that such a narrow reading is proper—it plainly identifies "the prosecution of the work" as the proper test of coverage. This Court so read the comparable language in the Heard Act in *United States ex rel. Hill* v. *American Surety Co.*, 200 U. S. 197.

In that case the Court recognized that a "liberal interpretation" was needed to further "the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end." *Id.*, at 203.[2] The *Hill* Court therefore allowed recovery to all who supplied labor

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and materials in the prosecution of the work provided for in [a federal construction] contract." Act of Aug. 13, 1894, ch. 280, 28 Stat. 278, as amended, 40 U. S. C. § 270 (1926 ed.).

[2] The purpose of the Act had been explained in the House Report:

"Your committee has fully considered the above bill, and find that there is no law now in existence for the protection of mechanics and material-men in this class of cases, as it is contrary to allow mechanics' or material-men's liens on public buildings or public works, and in many cases person or persons entering into contracts with the United States for the building of public buildings are wholly insolvent at the time or at the completion of such work, and thereby persons furnishing material or labor are without remedy.

"In all such cases the United States requires the usual penal bond from the contractor or contractors of public buildings or works with good and sufficient security for the protection of the Government, and it seems to the committee that it is nothing more than just that the persons furnishing material or labor for the construction of such work should also be protected in the premises, and that there should be an additional obligation in all such bonds to the effect that the persons furnishing material and labor for the construction of public building or work should have the right to bring suit on said bond . . . ." H. R. Rep. No. 97, 53d Cong., 1st Sess., 1 (1893).

This excerpt is significant, not only because it explains the origin of the legislation, but also because the first sentence illustrates the care with which committee reports are sometimes edited. Cf. n. 16, *infra*.

to the contractor, whether directly or indirectly through a subcontractor.[3]

The question at the heart of this case is whether Congress intended the Miller Act to cut back the coverage of the Heard Act. The fact that there was no significant change in the statutory language identifying the persons protected by the Act is a sufficient reason for concluding that no change in coverage was intended.[4] This conclusion is confirmed by a study of the entire legislative history of the Miller Act.

The Miller Act was primarily designed to speed workmen's recoveries under the Heard Act by correcting procedural flaws in the old Act. Not a word in the legislative history hinted that the coverage of the Heard Act was too broad. To the contrary, the proposed revision was consistently presented as

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[3] "In considering the statute and determining the scope of the bond divergent views have been urged upon the court. Upon the one hand it is insisted that the bond is to be strictly construed and a recovery limited to those who have furnished material or labor directly to the contractor, and upon the other that a more liberal construction be given and a recovery permitted to those who have furnished labor and materials which have been used in the prosecution of the work, whether furnished under the contract directly to the contractor, or to a subcontractor.

. . . . . .

"The courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of buildings to be owned and enjoyed by those who profit by the contribution of such labor or materials. . . .

. . . . . .

"Looking to the terms of this statute in its original form, and as amended in 1905, we find the same Congressional purpose to require payment for material and labor which have been furnished for the construction of public works." 200 U. S., at 202–204.

[4] In general, the principles that governed the Heard Act also control the Miller Act. See *Fleisher Eng. & Constr. Co.* v. *United States ex rel. Hallenbeck*, 311 U. S. 15, 18.

a measure to strengthen the existing rights of laborers on public works.[5] "The most radical changes made in the existing law by these bills," Congressman Miller, the proponent of the Act, explained, "is that we provide in this bill for two bonds; one a performance bond to the Government, and the other a payment bond."[6]

While Congress intended to speed the recoveries of protected workers, it sought to do so within the framework of existing law. Witnesses testifying in support of the Act urged Congress to preserve as much language from the Heard Act as possible, in order that past judicial interpretations would continue to apply under the new Act.[7] Congressman Miller

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[5] "The purpose sought to be accomplished" by the Act was stated by the Treasury Department, and the statement was adopted by the House Report:

"The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose the Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law." H. R. Rep. No. 1263, 74th Cong., 1st Sess., 1–2 (1935) (quoting a letter from the Treasury Department).

An identical passage appears in the Senate Report, which merely reprints the House Report. S. Rep. No. 1238, 74th Cong., 1st Sess., 1 (1935). Because there are no substantial differences between them, I shall refer only to the House Report.

[6] Hearings on Bonds of Contractors on Public Works before the House Committee on the Judiciary, 74th Cong., 1st Sess., 67 (1935).

[7] One witness told the Committee:

"The Heard Act has been on the statute books since 1905. Its predecessor had been in effect since August 1894. Now, in that forty-odd years the surety companies and the public generally have spent hundreds of thousands of dollars in finding out just what that act means. As I say, it has been called to the attention of courts hundreds of times and the decisions rendered have cost us lots of money and I do not think there is any other statute on the books that has been so thoroughly analyzed and

himself noted that the Committee was "rather loath to disturb existing law and existing court decisions where we can correct the difficulty without doing so." [8] Thus it is especially significant that the drafters lifted bodily from the Heard Act the coverage provision that had already been construed in *Hill*.

The historical context in which the statute was enacted confirms this analysis. The Miller Act was passed during the depression of the 1930's. Few construction laborers could then find work except on Government projects. Reform of the Heard Act drew urgency from the ironic discovery that precious construction jobs too often proved worthless when an irresponsible subcontractor was unable to pay his workers. An exchange between Senators Walsh and McCarran about the Miller Act shows the sentiments of the day:

> "Mr. WALSH. Mr. President, . . . the investigation conducted by the subcommittee of the Committee on Education and Labor showed a deplorable condition with reference to the way employees on public buildings were defrauded and cheated of their wages, and any measure that will tend to strengthen their rights and help them to secure their compensation is justified.
>
> "Mr. McCARRAN. That is the object of the pending bill . . . ." 79 Cong. Rec. 13383 (1935).

The language of the Miller Act is entirely consistent with the obvious legislative intent to preserve the substantive protections of the Heard Act. The Miller Act extends coverage

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construed. You might say every clause or every word has been examined by some court, some place, some time. We all know it and it is unusual now for any controversy to arise over the fundamental part of the law. The only controversy in the Heard Act suit is whether the claimant has a good claim or whether he has not." *Id.*, at 49–50.

Another witness concurred in this statement. *Id.*, at 59.

[8] *Id.*, at 102. Congressman Miller went on to state that he would have preferred simply to amend the Heard Act, but that he was eventually persuaded that a more thorough revision was necessary. *Ibid.*

to "all persons supplying labor and material in the prosecution of the work provided for in [the] contract . . . ." [9] This coverage is comparable to that afforded by many state mechanic's lien statutes. See generally Note, Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale L. J. 138 (1958). The purpose of both the Heard Act and the Miller Act was to protect persons supplying labor or materials for federal construction projects, which are not subject to state mechanics' liens.[10] Giving an ordinary meaning to the language used by both Acts will achieve that purpose.

The proviso to § 2 (a) of the Miller Act, which requires persons having a direct relationship with a subcontractor to give written notice of his claim to the prime contractor, does not narrow the coverage of the statute. It merely requires persons covered by the bond to give the required notice in order to preserve their protection.[11]

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[9] 40 U. S. C. § 270a (a)(2). Cf. *United States ex rel. Hill* v. *American Surety Co.*, 200 U. S. 197, 204:

"[A]ll persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

"If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated."

[10] "As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual." *Id.*, at 203.

[11] The proviso states:

"*Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or

It is true, of course, that it would be anomalous to require that notice be given by employees of first-tier subcontractors but not by employees of second-tier subcontractors.[12] *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U. S. 102, 108. But that anomaly is entirely avoided if the term "subcontractor" is read to refer to any person or firm that has contracted to do any part of the work provided for in the prime contract, whether that person has dealt directly with the prime contractor or with another subcontractor. In the common usage of the construction trades, the term "subcontractor" does not include ordinary laborers or materialmen. *Id.*, at 109. But the term is often used to describe subordinate contractors who have accepted contractual responsibility for a portion of the work covered by the basic contract, no matter how many subcontractors lie between the general contractor and the subcontractor who actually does the work.[13]

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implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made . . . ." 40 U. S. C. § 270b (a).

[12] Such an anomaly is produced by a narrow reading of the proviso to encompass only persons dealing with "first-tier" subcontractors. Under the narrow reading, those dealing with first-tier subcontractors must give notice, while those dealing with second-tier subcontractors need not. The Court avoids this anomaly by cutting back on the *coverage* provision. Rather than letting the tail wag the dog, it is more sensible to read the notice provision broadly, to match the breadth of the coverage provision.

[13] The Court relies on a quotation from *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U. S. 102, declaring that "a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." *Id.*, at 109. The Court italicizes the dictum and omits the holding. *Ante*, at 590. I agree with the holding; ordinary laborers and materialmen who do not deal with the prime contractor or a subcontractor do not supply labor or materials "in the prosecution of the work." Cf. *MacEvoy, supra*, at 107 (leaving question open). The dictum is unfortunately worded, but it does not

State courts, which have more occasion to deal with construction contracts than we do, recognize that a generic use of the term subcontractor is entirely proper. For example, Colorado's construction bond law protects persons furnishing labor or materials to a "contractor, or his subcontractor." Despite the personal pronoun, the Colorado Supreme Court has held that the bond covers those who deal with a "second-tier" subcontractor, saying:

> "To construe the term 'sub-contractor' so as to exclude a 'sub-subcontractor' from the protection granted by the contractor's bond statute would require us to ignore the purpose of the statute. Since the benefits of our mechanic's lien act do not apply to projects constructed by governmental agencies, a remedy similar to our mechanic's lien statute was provided by the legislature for the protection of those furnishing supplies or material for such projects. . . . The statute stands in lieu of the mechanic's lien statute, and is designed to protect those who supply labor and materials for public works." *South-Way Constr. Co.* v. *Adams City Serv.*, 169 Colo. 513, 516–517, 458 P. 2d 250, 251 (1969).

Other courts have taken a similar approach. See, *e. g.*, *Nash Eng. Co.* v. *Marcy Realty Corp.*, 222 Ind. 396, 54 N. E. 2d 263 (1944); *Bumb* v. *Petersmith Controls, Inc.*, 377 F. 2d 817 (CA9 1967) (remote subcontractor is protected "subcontractor" under California law); *Hey Kiley Man, Inc.* v. *Azalea Gardens Apts.*, 333 So. 2d 48, 50–51 (Fla. App. 1976). See also Note, 45 Harv. L. Rev. 1236, 1238–1239 (1932) (using "subcontractor" generically in noting a trend favoring bond coverage for "remote subcontractors").

Thus, if we consider the language of the statute, its broad purpose to provide protection comparable to that afforded by

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contradict my view. Utimately, a second-tier subcontractor who takes a portion of the contract takes it "from the prime contractor," although he takes it indirectly.

state mechanic's lien laws on private contracts, and its specific purpose to provide protection for laborers performing work on federal projects, we must conclude that employees of a "sub-subcontractor" who actually perform work on the job are protected.

II

The contrary argument rests almost entirely [14] on a statement in the Committee Reports that draws a distinction

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[14] It has been argued that Congress was unwilling to impose liability on sureties for a long chain of relationships. But this argument ignores the control that sureties and general contractors have over their subcontractors. They may refuse to deal with subcontractors who do not indemnify them against remote claims. They may even require a bond from each subcontractor. In fact, because the general contractor is liable, even under the Court's view, for claims against subcontractors in the first tier, indemnity agreements between general contractors and their subcontractors are common today. One was required in the present case. *Ante*, at 593 n. 7. My reading of the statute would simply lead cautious subcontractors to demand similar guarantees from their subcontractors.

There is no reason to fear that sureties' liability will grow beyond their control or their ability to estimate. The cost of the entire project provides a basis for estimating the aggregate contingent liability.

In addition, the Court suggests that the Miller Act would have required laborers to give notice to intermediate subcontractors as well as the general contractor if a more generous reading of the statute had been contemplated. *Ante*, at 590–591, n. 4. But the drafters were understandably worried that many unwary workers would forfeit their protection if complicated notice requirements were imposed. Indeed, the Treasury Department opposed *any* notice requirement for just this reason:

"[O]ver nine-tenths of your laborers and the material men doing business on a small scale that were not in constant touch with their lawyers would not know of the requirement, and they would wake up to find that their period had expired within which to give such notice, and they would be barred." Hearings, *supra* n. 6, at 99–100. See also *id.*, at 103, 30–31, and 36–37.

Requiring notice to the surety as well as to the general contractor would have protected sureties from deceitful general contractors, and a requirement of this nature was suggested to the Committee. *Id.*, at 63. The Committee rejected that suggestion. Forcing the laborer to notify several

between a "sub-subcontractor" and "more remote relationships." [15] I believe the significance of that statement has been overemphasized.

Those who have participated in the making of legislative history know that congressional reports sometimes contain statements that are merely intended to summarize portions of the hearings or to answer testimony expressing specific concerns about a bill. For this reason, the hearings should be examined in order to understand the excerpt on which the Court relies. In three days of testimony, the coverage of the Act was mentioned only briefly. A witness for a surety company raised the specter of remote materialmen seeking to recover as "subcontractors," an idea Congressman Miller quickly rejected:

> "Colonel PROCTOR. . . . [If] it will cover everybody all the way down the line *whether the work goes into the job or not* you have an insurance policy and not a surety. For example, if it will cover the labor of the quarryman that strips the quarry, that he is a subcontractor to the man that cuts the stone, that he is a subcontractor with the man that lays the stone and he is a subcontractor with the general contractor, you have a situation there that is an insurance policy and not a bond.

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parties is an added burden that increases the danger of lost claims. Congress could have concluded that a single notice requirement was all that should be imposed on workers and small businessmen.

As a practical matter, no prejudice is likely to flow from this omission. If the bond is held to cover claims against remote subcontractors, proximate subcontractors will no doubt be required to indemnify the general contractor. In return for the indemnity, these subcontractors will no doubt demand that the general contractor promptly transmit any statutory notice he receives.

[15] "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H. R. Rep. No. 1263, 74th Cong., 1st Sess., 3 (1935).

"Mr. MILLER. We are not figuring in going into all the subcontractors." Hearings, *supra* n. 6, at 61–62 (emphasis added).

This colloquy was concerned with the danger that the term "subcontractor" might be used loosely to describe the suppliers or employees of materialmen. It was that danger that I believe the Committee Report was intended to forestall. Obviously, suppliers or employees of materialmen do not provide "work [that] goes into the job." They are not considered "subcontractors" under the most common usage in the construction trades, as this Court recognized when it construed the Miller Act to bar the claims of remote materialmen and their employees. *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U. S. 102.

It is the "remote relationship" of persons like the quarryman and the stonecutter mentioned in the hearings that I believe the author of the Committee Report intended to exclude from the statute. Since the wording of the statute is itself adequate to effectuate this intent, there is no reason to give further effect to the unnecessarily broad language used by the author of the Committee Report to allay the narrow concern identified in the Committee hearings.[16] If Congress had intended to do more than allay that concern—if it had intended to cut back on the coverage of the Heard Act—I am convinced that it would have used *statutory* language to accomplish its purpose.[17]

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[16] As is demonstrated by the legislative history of the Heard Act, see n. 2, *supra*, a committee report is not edited as carefully as the bill itself.

[17] Unlike the Court, I would not put great weight on the industry's longstanding "assumption" about the law. *Ante*, at 592–593, and n. 7. For many years after passage of the Miller Act, no court ratified this assumption, and the cases since the mid-1950's have been divided. The Court notes three Circuits that have supported the industry's view and one that has attacked it. *Ante*, at 588–589, n. 2. It finds a similar pattern among the District Courts: four in favor and one opposed. *Ante*, at 592

In sum, while I cannot unequivocally assert that my explanation of the statement in the Committee Report is correct, the apparent genesis of the statement casts sufficient doubt on its intended purpose to prevent it from overriding what I regard as compelling evidence of a contrary congressional intent.

I respectfully dissent.

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n. 6 The preponderance of authority supports the industry, but the cases hardly justify a claim that the law was "well settled" or certain before today. The fact that this case is before us argues to the contrary, for this Court seldom grants certiorari to decide "well-settled"questions.

Reporter's Note

The next page is purposely numbered 801. The numbers between 606 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM END OF OCTOBER TERM, 1976 THROUGH FEBRUARY 22, 1978

Cases Dismissed in Vacation

No. 76–1665. Parker *v.* Boorstin, Librarian of Congress, et al. C. A. D. C. Cir. Certiorari dismissed August 29, 1977, under this Court's Rule 60.

No. 76–1712. Local 741, International Brotherhood of Electrical Workers, AFL–CIO *v.* Myers et al. C. A. 5th Cir. Certiorari dismissed August 29, 1977, under this Court's Rule 60. Reported below: 544 F. 2d 837.

No. 76–1311. California-American Water Co. *v.* South Bay Irrigation District et al. Ct. App. Cal., 4th App. Dist. Certiorari dismissed August 30, 1977, under this Court's Rule 60. Reported below: 61 Cal. App. 3d 944, 133 Cal. Rptr. 166.

No. 76–1673. Warren, Executor, et al. *v.* Serody et al. C. A. 5th Cir. Certiorari dismissed August 30, 1977, under this Court's Rule 60. Reported below: 540 F. 2d 777.

No. 77–5151. Cirillo *v.* United States. C. A. 2d Cir. Certiorari dismissed September 1, 1977, under this Court's Rule 60. Reported below: 554 F. 2d 54.

No. 76–1734. Vuitch et al. *v.* Califano, Secretary of Health, Education, and Welfare. C. A. D. C. Cir. Certiorari before judgment dismissed September 12, 1977, under this Court's Rule 60.

No. 76–932. National Football League et al. *v.* Mackey et al. C. A. 8th Cir. Certiorari dismissed September 12, 1977, under this Court's Rule 60. Reported below: 543 F. 2d 606.

No. 77–233. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed September 21, 1977, under this Court's Rule 60. Reported below: 554 F. 2d 235.

No. 77–59. POWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed September 27, 1977, under this Court's Rule 60. Reported below: 552 F. 2d 368.

No. 76–6841. MCGHEE *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari dismissed September 27, 1977, under this Court's Rule 60.

No. 77–5290. KING *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari dismissed September 27, 1977, under this Court's Rule 60. Reported below: 336 So. 2d 1200.

No. 77–50. ORDER OF AHEPA, AKA AMERICAN HELLENIC EDUCATIONAL & PROGRESSIVE ASSN., INC. *v.* TRAVEL CONSULTANTS, INC. Ct. App. D. C. Certiorari dismissed September 29, 1977, under this Court's Rule 60. Reported below: 367 A. 2d 119.

OCTOBER 3, 1977

Dismissal Under Rule 60

No. 77–5310. TURNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 558 F. 2d 604.

Affirmed on Appeal

No. 76–1563. COCA COLA BOTTLING COMPANY OF PUERTO RICO, INC., ET AL. *v.* ALONSO-GARCIA, MANAGER, STATE INSURANCE FUND, ET AL. Affirmed on appeal from D. C. P. R.

No. 77–180. HAGOPIAN *v.* JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. Affirmed on appeal from D. C. Mass. Reported below: 429 F. Supp. 367.

No. 77–84. SMITH ET AL. *v.* BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA ET AL. Affirmed on appeal from D. C. W. D. N. C. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 429 F. Supp. 871.

No. 77–250. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE ET AL. *v.* BLANTON, GOVERNOR OF TENNESSEE, ET AL. Affirmed on appeal from D. C. M. D. Tenn. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 433 F. Supp. 97.

Appeals Dismissed

No. 76–1258. TERRITO ET AL. *v.* POCHE ET AL. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Reported below: 339 So. 2d 1212.

No. 76–1340. BONNER *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 76–1488. JACOBSON *v.* CITY OF TUCSON ET AL. Appeal from Sup. Ct. Ariz. dismissed for want of substantial federal question. Reported below: 113 Ariz. 534, 558 P. 2d 686.

No. 76–1566. COMLY *v.* LOWER SOUTHAMPTON TOWNSHIP. Appeal from Commw. Ct. Pa. dismissed for want of substantial federal question. Reported below: 27 Pa. Commw. 202, 365 A. 2d 883.

No. 76–1674. STEPHENSON ET AL. *v.* DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES OF FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 342 So. 2d 60.

No. 76–1714. ROSENTHAL *v.* NEVADA ET AL. Appeal from Sup. Ct. Nev. dismissed for want of substantial federal question. Reported below: 93 Nev. 36, 559 P. 2d 830.

No. 76–1688. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* BRADY, CHAIRMAN, TAX COMMISSION OF MISSISSIPPI. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 342 So. 2d 295.

No. 76–1741. SCHUPAK ET AL. *v.* FORMAN & ZUCKERMAN, P. A. Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 31 N. C. App. 62, 228 S. E. 2d 503.

No. 76–1759. DAYTONA BEACH RACING AND RECREATIONAL FACILITIES DISTRICT ET AL. *v.* VOLUSIA COUNTY ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 341 So. 2d 498.

No. 77–61. LEIGH *v.* OKLAHOMA EX REL. TAX COMMISSION OF OKLAHOMA. Appeal from Sup. Ct. Okla. dismissed for want of substantial federal question.

No. 77–86. GREGG *v.* INDIANA. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: —— Ind. App. ——, 356 N. E. 2d 1384.

No. 77–125. GETTY OIL CO. *v.* TAX COMMISSION OF OKLAHOMA. Appeal from Sup. Ct. Okla. dismissed for want of substantial federal question. Reported below: 563 P. 2d 627.

No. 77–133. FAULK *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. Reported below: 261 Ark. 543, 551 S. W. 2d 194.

No. 77–181. CORLESS *v.* CITY OF LEBANON. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of substantial federal question.

No. 77–210. EVEANDRA ENTERPRISES, INC. *v.* COUNTY OF NASSAU. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 42 N. Y. 2d 849, 366 N. E. 2d 287.

No. 77–202. IN RE KADANS. Appeal from Sup. Ct. Nev. dismissed for want of substantial federal question. Reported below: 93 Nev. 216, 562 P. 2d 490.

No. 77–287. REEL, EXECUTOR *v.* DEPARTMENT OF REVENUE OF IOWA. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. Reported below: 255 N. W. 2d 99.

No. 76–1634. BAER ET VIR, EXECUTORS *v.* BAER. Appeal from Sup. Ct. Utah dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 562 P. 2d 614.

No. 76–1647. KATZMAN *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 343 So. 2d 38.

No. 76–1681. GOLDEN *v.* CALIFORNIA. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 65 Cal. App. 3d 789, 135 Cal. Rptr. 512.

No. 76–1699. LEADERSHIP HOUSING, INC., ET AL. *v.* DEPARTMENT OF REVENUE OF FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 343 So. 2d 611.

No. 76–1811. TRACY *v.* OHIO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–1778. RUSSELL *v.* CITY OF RAYTOWN. Appeal from Ct. App. Mo., Kansas City Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 544 S. W. 2d 48.

No. 76–1807. GENUINE PARTS CO. ET AL. *v.* COURT OF APPEALS OF NEW MEXICO ET AL. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–1824. JACKSON *v.* STONE & SIMONS ADVERTISING, INC., ET AL. Appeal from D. C. E. D. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–6656. ALLEN *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–6798. BATES *v.* INCE. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 28 Ore. App. 71, 558 P. 2d 1253.

No. 76–6995. JOHNS *v.* HABER. Appeal from Super. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–45. CALHOUN *v.* NEW YORK ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 553 F. 2d 93.

No. 76–6867. CORRADO ET UX. *v.* PROVIDENCE REDEVELOPMENT AGENCY. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 117 R. I. 647, 370 A. 2d 226.

No. 77–77. O'BRIEN, EXECUTOR, ET AL. *v.* CITY OF SYRACUSE ET AL. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 App. Div. 2d 186, 388 N. Y. S. 2d 866.

No. 77–145. CRISMON *v.* UNITED STATES. Appeal from C. A. 9th Cir. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 550 F. 2d 1205.

No. 77–44. BARNES & TUCKER CO. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. Motion of National Coal Assn. et al. for leave to file a brief as *amici curiae* granted. Appeal dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 472 Pa. 115, 371 A. 2d 461.

No. 77–234. SPENCER *v.* SPENCER ET AL. Appeal from D. C. M. D. N. C. dismissed for want of jurisdiction. *MTM, Inc.* v. *Baxley,* 420 U. S. 799 (1975). Reported below: 430 F. Supp. 683.

No. 77–5216. TOWNSLEY *v.* BOARD OF PORT COMMISSIONERS, PORT OF OAKLAND. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of a properly presented federal question.

No. 76–1735. MARABLE-PIRKLE, INC. *v.* TURNER ET AL. Appeal from Sup. Ct. Ga. Motion of appellee Turner for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question. Reported below: 238 Ga. 517, 233 S. E. 2d 773.

No. 77–114. QUIRK ET AL. *v.* MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK ET AL. Appeal from Ct. App. N. Y. Motion of United States Trust Company of New York for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 41 N. Y. 2d 644, 363 N. E. 2d 549.

Vacated and Remanded on Appeal

No. 76–1704. CAMPBELL, SUPERINTENDENT OF PUBLIC INSTRUCTION OF VIRGINIA, ET AL. *v.* KRUSE ET AL. Appeal from D. C. E. D. Va. Judgment vacated and case remanded to the United States District Court for the Eastern District of Virginia with directions to decide the claim based on the federal statute, § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. § 794 (1970 ed., Supp. V); *Westby* v. *Doe*, 433 U. S. 901 (1977). MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 431 F. Supp. 180.

Certiorari Granted—Vacated and Remanded

No. 76–1692. PERCY, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN *v.* TERRY. Sup. Ct. Wis. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to consider whether judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). Reported below: 74 Wis. 2d 487, 247 N. W. 2d 109.

Vacated and Remanded After Certiorari Granted

No. 76–529. MONTANA POWER CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–585. AMERICAN PETROLEUM INSTITUTE ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–594. INDIANA-KENTUCKY ELECTRIC CORP. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–603. ALABAMA POWER CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–619. UTAH POWER & LIGHT CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 76–620. WESTERN ENERGY SUPPLY & TRANSMISSION ASSOCIATES ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. [Certiorari granted, 430 U. S. 953.] Motion of the Solicitor General to dismiss the writs of certiorari as improvidently granted denied. Judgment vacated and cases remanded for further consideration in light of Clean Air Act Amendments of 1977, 91 Stat. 685, 42 U. S. C. § 7401 *et seq.* (1976 ed., Supp. I), and to consider suggestion of mootness filed by intervenor-respondents. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and these cases. Reported below: 176 U. S. App. D. C. 335, 540 F. 2d 1114.

Miscellaneous Orders

No. ——. PHILLIPS *v.* TOBIN ET AL. C. A. 2d Cir. Motion for an order directing the Clerk to accept as properly printed petition for writ of certiorari denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Report of Special Master received and ordered filed. [For earlier orders herein, see *e. g.*, 423 U. S. 942.]

No. 75–562. ROSEBUD SIOUX TRIBE *v.* KNEIP, GOVERNOR OF SOUTH DAKOTA, ET AL., 430 U. S. 584. Motion of petition to retax costs denied.

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No. 75–651. TEAMSTERS LOCAL UNION 657 *v.* RODRIGUEZ ET AL.; TEAMSTERS LOCAL UNION 657 *v.* HERRERA ET AL.; and TEAMSTERS LOCAL UNION 657 *v.* RESENDIS ET AL.;

No. 75–715. SOUTHERN CONFERENCE OF TEAMSTERS *v.* RODRIGUEZ ET AL.; SOUTHERN CONFERENCE OF TEAMSTERS *v.* HERRERA ET AL.; and SOUTHERN CONFERENCE OF TEAMSTERS *v.* RESENDIS ET AL.; and

No. 75–718. EAST TEXAS MOTOR FREIGHT SYSTEM, INC. *v.* RODRIGUEZ ET AL., 431 U. S. 395. Motion of respondents to retax costs denied.

No. 76–419. VERMONT YANKEE NUCLEAR POWER CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 76–528. CONSUMERS POWER CO. *v.* AESCHLIMAN ET AL. C. A. D. C. Cir. [Certiorari granted, 429 U. S. 1090.] Joint motion of petitioners and the Solicitor General on behalf of the federal respondents for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Nonfederal respondents also allotted 15 additional minutes for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 76–811. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* BAKKE. Sup. Ct. Cal. [Certiorari granted, 429 U. S. 1090.] Motion of the State of California to participate in oral argument as *amicus curiae* denied. Motion of the Solicitor General for leave to file a brief as *amicus curiae* granted; motion to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Motions of Pacific Legal Foundation, Chamber of Commerce of the United States, and NAACP Legal Defense & Educational Fund, Inc., to participate in oral argument as *amicus curiae* denied. Motion of petitioner for additional time for oral argument granted and 15 additional minutes allotted for that purpose; respondent also allotted 15 additional minutes for oral argument.

No. 76–545. UNITED AIRLINES, INC. *v.* MCDONALD, 432 U. S. 385. Respondent requested to file a response to petition for rehearing within 30 days. MR. JUSTICE STEVENS took no part in the consideration or decision of this order.

No. 76–859. HAZELWOOD CHRONIC & CONVALESCENT HOSPITAL, INC., DBA KEARNEY STREET CONVALESCENT CENTER *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., 430 U. S. 952. Motion for clarification and recall of judgment denied.

No. 76–864. CITY OF LAFAYETTE, LOUISIANA, ET AL. *v.* LOUISIANA POWER & LIGHT CO. C. A. 5th Cir. [Certiorari granted, 430 U. S. 944.] Motion of Columbus & Southern Ohio Electric Co. et al. for leave to file a brief as *amici curiae* granted.

No. 76–1523. SWOAP, DIRECTOR, DEPARTMENT OF BENEFIT PAYMENTS OF CALIFORNIA *v.* GARCIA ET AL. Ct. App. Cal., 2d App. Dist.;

No. 76–1609. INDIANA *v.* SCOTTSDALE MALL. C. A. 7th Cir.;

No. 76–1645. GENERAL DYNAMICS CORP. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Sup. Ct. Tex.;

No. 76–1690. BERRY ET AL. *v.* DOLES, CHAIRMAN, BOARD OF COMMISSIONERS OF ROADS AND REVENUES OF PEACH COUNTY, ET AL. D. C. M. D. Ga.;

No. 76–6853. RANDLE ET AL. *v.* BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. C. A. 3d Cir.;

No. 77–97. ALLIED CHEMICAL CORP. *v.* WHITE ET AL. C. A. 5th Cir.; and

No. 77–388. WASHINGTON ET AL. *v.* CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION. C. A. 9th Cir. The Solicitor General is invited to file briefs in each of these cases expressing the views of the United States.

No. 76–1095. COMMISSIONER OF INTERNAL REVENUE *v.* KOWALSKI ET UX. C. A. 3d Cir. [Certiorari granted, 430 U. S. 944.] Motion of respondents for divided argument denied.

No. 76–1662. UNITED STATES *v.* BOARD OF COMMISSIONERS OF SHEFFIELD, ALABAMA, ET AL. D. C. N. D. Ala. [Probable jurisdiction noted, 433 U. S. 906.] Motion of Mexican American Legal Defense & Educational Fund et al. for leave to file a brief as *amici curiae* granted.

No. 76–6720. RICHMOND *v.* ARIZONA, 433 U. S. 915. Respondent requested to file a response to petition for rehearing within 30 days.

No. 77–5150. FAISON *v.* WASHINGTON. Motion for leave to file petition for writ of certiorari denied.

No. 77–5125. BEARDEN *v.* SOUTH CAROLINA ET AL.;
No. 77–5143. PETERSON *v.* MOORE, WARDEN;
No. 77–5268. ROBINSON *v.* BENSON, WARDEN, ET AL.;
No. 77–5281. AVANT *v.* MOORE, WARDEN; and
No. 77–5327. MCDONALD *v.* THOMPSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 77–5317. RANDLE *v.* RIGGSBY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 76–1651. NEW JERSEY DENTAL ASSN. ET AL. *v.* BROTMAN, U. S. DISTRICT JUDGE;
No. 76–1656. EDMOND *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ET AL.; and
No. 76–6430. FRAZIER *v.* GROSSMAN, DEPUTY CLERK, U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

No. 76–6586. GOODSPEED *v.* BREWSTER, U. S. DISTRICT JUDGE;

No. 76–6711. LEWIS *v.* DOYLE, JUDGE;

No. 76–6763. RIDDELL *v.* VOORHEES, U. S. DISTRICT JUDGE, ET AL.;

No. 76–6843. HAM *v.* HEMPHILL, U. S. DISTRICT JUDGE, ET AL.;

No. 76–6894. KAPLAN *v.* LUMBARD, U. S. DISTRICT JUDGE, ET AL.;

No. 76–6897. DOCKERY *v.* SNEED, U. S. CIRCUIT JUDGE;

No. 76–6939. GUZMAN *v.* JONES ET AL.;

No. 76–6950. ROBINSON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS;

No. 76–6955. ROBINSON *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL.;

No. 76–6958. BEACHEM *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT; and

No. 77–5180. MORGAN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 77–38. TIMMONS *v.* LAWTON ET AL. Motion for leave to file petition for writ of mandamus, prohibition, and other relief denied.

No. 77–5159. RIDDELL *v.* WRIGHT, CHIEF JUSTICE, SUPREME COURT OF WASHINGTON, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted

No. 76–1184. MALONE, COMMISSIONER OF LABOR AND INDUSTRY FOR MINNESOTA *v.* WHITE MOTOR CORP. ET AL. Appeal from C. A. 8th Cir. Probable jurisdiction noted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 545 F. 2d 599.

No. 76–1650. OHRALIK *v.* OHIO STATE BAR ASSN. Appeal from Sup. Ct. Ohio; and

No. 77–56. IN RE SMITH. Appeal from Sup. Ct. S. C. Motion of Public Citizen et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted and cases set for oral argument in tandem. Reported below: No. 76–1650, 48 Ohio St. 2d 217, 357 N. E. 2d 1097; No. 77–56, 268 S. C. 259, 233 S. E. 2d 301.

No. 77–10. EXXON CORP. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–11. SHELL OIL CO. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–12. CONTINENTAL OIL CO. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–47. GULF OIL CORP. *v.* GOVERNOR OF MARYLAND ET AL.; and

No. 77–64. ASHLAND OIL, INC., ET AL. *v.* GOVERNOR OF MARYLAND ET AL. Appeals from Ct. App. Md. Motions of Pacific Legal Foundation and Champlin Petroleum Co. et al. for leave to file briefs as *amici curiae* in No. 77–10 granted. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these motions and cases. Reported below: 279 Md. 410, 370 A. 2d 1102 and 372 A. 2d 237.

Certiorari Granted

No. 76–1608. MICHIGAN *v.* TYLER ET AL. Sup. Ct. Mich. Certiorari granted. Reported below: 399 Mich. 564, 250 N. W. 2d 467.

No. 76–1610. AYALA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 550 F. 2d 1196.

No. 76–1706. DEPARTMENT OF REVENUE OF WASHINGTON *v.* ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES ET AL. Sup. Ct. Wash. Certiorari granted. Reported below: 88 Wash. 2d 315, 559 P. 2d 997.

No. 76–1750. STUMP ET AL. *v.* SPARKMAN ET VIR. C. A. 7th Cir. Certiorari granted. Reported below: 552 F. 2d 172.

No. 76–1767. NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari granted. Reported below: 181 U. S. App. D. C. 41, 555 F. 2d 978.

No. 76–1810. CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER ET AL. *v.* MANHART ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 553 F. 2d 581.

No. 76–1471. FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1521. CHANNEL TWO TELEVISION CO. ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1595. NATIONAL ASSOCIATION OF BROADCASTERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 76–1604. AMERICAN NEWSPAPER PUBLISHERS ASSN. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1624. ILLINOIS BROADCASTING CO., INC., ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.; and

No. 76–1685. POST CO. ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 181 U. S. App. D. C. 1, 555 F. 2d 938.

No. 76–1560. UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL. C. A. 3d Cir. Certiorari granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 550 F. 2d 115.

No. 76–1484. ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. *v.* STANFORD DAILY ET AL.; and

No. 76–1600. BERGNA, DISTRICT ATTORNEY OF SANTA CLARA COUNTY, ET AL. *v.* STANFORD DAILY ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 550 F. 2d 464.

No. 76–1572. UNITED STATES *v.* GRAYSON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 550 F. 2d 103.

No. 76–1629. UNITED STATES *v.* WHEELER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 545 F. 2d 1255.

No. 77–142. UNITED STATES *v.* CULBERT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 548 F. 2d 1355.

No. 76–1596. UNITED STATES *v.* MAURO ET AL. C. A. 2d Cir. Motion of respondent Fusco for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for argument with No. 77–52, immediately *infra*. Reported below: 544 F. 2d 588.

No. 77–52. UNITED STATES *v.* FORD. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for argument with No. 76–1596, immediately *supra*. Reported below: 550 F. 2d 732.

No. 76–1726. MOBIL OIL CORP. *v.* HIGGINBOTHAM, ADMINISTRATRIX, ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 545 F. 2d 422.

No. 76–1800. UNITED STATES *v.* SOTELO ET UX. C. A. 7th Cir. Certiorari granted and case set for argument with No. 76–1835, immediately *infra*. Reported below: 551 F. 2d 1090.

No. 76–1835. SLODOV *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted and case set for argument with No. 76–1800, immediately *supra*. Reported below: 552 F. 2d 159.

No. 77–25. FLAGG BROS., INC., ET AL. *v.* BROOKS ET AL.;
No. 77–37. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK *v.* BROOKS ET AL.; and
No. 77–42. AMERICAN WAREHOUSEMEN'S ASSN. ET AL. *v.* BROOKS ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 553 F. 2d 764.

Certiorari Denied. (See also Nos. 76–1681, 76–1699, 76–1778, 76–1807, 76–1811, 76–1824, 76–6656, 76–6798, 76–6867, 76–6995, 77–45, 77–77, and 77–145, *supra*.)

No. 76–1254. IN RE HUNT. Ct. App. D. C. Certiorari denied. Reported below: 367 A. 2d 155.

No. 76–1298. WORTHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 1275.

No. 76–1345. SOVEREIGN NEWS CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 2d 909.

No. 76–1373. MEYER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 212 Ct. Cl. 537, 546 F. 2d 431.

No. 76–1385. SEXTON *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 76–1396. SHAFER ET UX. *v.* SMITH ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 38 Ill. App. 3d 217, 347 N. E. 2d 292.

No. 76–1412. BORLAND ET AL. *v.* BAYONNE HOSPITAL ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 72 N. J. 152, 369 A. 2d 1.

No. 76–1415. LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 223, 546 F. 2d 989.

No. 76–1439. PIHAKIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 973.

No. 76–1443. ALLIED MEAT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied.

No. 76–1449. SALMON *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY. C. A. D. C. Cir. Certiorari denied.

No. 76–1453. O'BRIEN *v.* HALL, CORRECTIONS COMMISSIONER. C. A. 1st Cir. Certiorari denied. Reported below: 546 F. 2d 414.

No. 76–1455. WELLMAN INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 128, 549 F. 2d 830.

No. 76–1456. KLEIN *v.* EDELSTEIN, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 300.

No. 76–1457. LUNDY PACKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 300.

No. 76–1460. VEGAS VIC, INC., DBA PIONEER CLUB *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 828.

No. 76–1468. HENDRIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1225.

No. 76–1470. ROSENBLUM ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 1140.

No. 76–1480. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 829.

No. 76–1481. BALLENILLA-GONZALEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 2d 515.

No. 76–1482. LAKESIDE MERCY HOSPITAL, INC. *v.* INDIANA STATE BOARD OF HEALTH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1170.

No. 76–1486. BROWN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 140 Ga. App. 160, 230 S. E. 2d 128.

No. 76–1487. CONTINENTAL CASUALTY CO. *v.* CHAMPION INTERNATIONAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 2d 502.

No. 76–1489. HEITLAND ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 495.

No. 76–1491. NATELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 5.

No. 76–1494. ANDERSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 2d 249.

No. 76–1499. RODMAN, TRUSTEE IN BANKRUPTCY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 548 F. 2d 1109.

No. 76–1502. BANTA ET AL. *v.* UNITED STATES ET AL.; and No. 76–1668. CITY OF ST. LOUIS ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 506.

No. 76–1504. MCGEE *v.* RAILROAD RETIREMENT BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 807.

No. 76–1505. SAFIR *v.* KREPS, SECRETARY OF COMMERCE, ET AL.;

No. 77–62. AMERICAN EXPORT LINES, INC., ET AL. *v.* SAFIR ET AL.; and

No. 77–65. KREPS, SECRETARY OF COMMERCE, ET AL. *v.* SAFIR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 261, 551 F. 2d 447.

No. 76–1506. SMITH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. certiorari denied. Reported below: 41 Ill. App. 3d 1073, 358 N. E. 2d 741.

No. 76–1508. EGGE *v.* DAVIS, PUBLIC UTILITY COMMISSIONER OF OREGON. Ct. App. Ore. Certiorari denied. Reported below: 27 Ore. App. 383, 556 P. 2d 153.

No. 76–1510. GRABER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 561.

No. 76–1514. CONSIDINE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 550 F. 2d 693.

No. 76–1515. PACIFIC NORTHWEST BELL TELEPHONE CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1313.

No. 76–1520. HENRY *v.* UNITED OVERSEAS MARINE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1160.

No. 76–1525. RAMIREZ *v.* UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF RECLAMATION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 645.

No. 76–1528. AMERICAN AIRLINES, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 276, 546 F. 2d 1042.

No. 76–1535. TRONE, TRUSTEE, ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 671, 553 F. 2d 105.

No. 76–1536. KABUA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 212 Ct. Cl. 160, 546 F. 2d 381.

No. 76–1537. MASON *v.* CITY INVESTING CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 557.

No. 76–1542. LASKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 835.

No. 76–1546. CRUZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 202.

No. 76–1547. SLOAN ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 152.

No. 76–1548. ALATERAS *v.* HEPTING ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 342 So. 2d 247.

No. 76–1550. MEAGHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 313.

No. 76–1554. GRANDVIEW BANK & TRUST CO. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 550 F. 2d 415.

No. 76–1555. BASIN, INC. *v.* FEDERAL ENERGY ADMINISTRATION ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 552 F. 2d 931.

No. 76–1561. NATIONAL LABOR RELATIONS BOARD *v.* ELECTRO VECTOR, INC. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 35.

No. 76–1567. COMLY *v.* LOWER SOUTHAMPTON TOWNSHIP. Commw. Ct. Pa. Certiorari denied. Reported below: 27 Pa. Commw. 202, 365 A. 2d 883.

No. 76–1570. ROBINSON ET AL. *v.* UNION CARBIDE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 652 and 544 F. 2d 1258.

No. 76–1571. WILEY, MOTHER AND NEXT OF KIN OF BERRY *v.* MEMPHIS POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 1247.

No. 76–1573. BARNETTE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 187.

No. 76–1575. CONTROL DATA CORP. *v.* TECHNITROL, INC. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 2d 992.

No. 76–1577. HALL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 249 N. W. 2d 843.

No. 76–1578. VISCONTI *v.* UNITED STATES; and
No. 76–6697. VISCONTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 570.

No. 76–1579. GRAND LODGE OF FREE AND ACCEPTED MASONS, MASONIC HOME *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 1276.

No. 76–1580. SANDS POINT NURSING HOME *v.* INGRAHAM, COMMISSIONER OF HEALTH OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 837, 361 N. E. 2d 1048.

No. 76–1581. FREEDMAN *v.* HIGGINBOTHAM, U. S. DISTRICT JUDGE. C. A. 3d Cir. Certiorari denied. Reported below: 552 F. 2d 498.

No. 76–1582. WHITMER *v.* WHITMER. Super. Ct. Pa. Certiorari denied. Reported below: 243 Pa. Super. 462, 365 A. 2d 1316.

No. 76–1583. AHMADI ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–1584. HENNEPIN BROADCASTING ASSOCIATES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied.

No. 76–1585. HENSON ET AL. *v.* ALPHIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 85 and 552 F. 2d 1033.

No. 76–1590. TIGHE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 551 F. 2d 18.

No. 76–1591. SAPIA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 160, 359 N. E. 2d 688.

No. 76–1592. MILLER, TRUSTEE IN BANKRUPTCY *v.* NEW YORK PRODUCE EXCHANGE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 762.

No. 76–1593. SKINNER *v.* MALLARD TRUCK LINES, INC., ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 340 So. 2d 372.

No. 76–1594. NORTH WASHINGTON NEIGHBORS, INC., ET AL. *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 367 A. 2d 143.

No. 76–1597. BASSETT FURNITURE INDUSTRIES, INC., ET AL. *v.* BRAVMAN; and

No. 76–1805. BRAVMAN *v.* BASSETT FURNITURE INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 552 F. 2d 90.

No. 76–1598. STANDARD FORGE & AXLE CO., INC. *v.* ADAMS, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 309, 551 F. 2d 1268.

No. 76–1599. PRYOR *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 212 Ct. Cl. 578, 553 F. 2d 104.

No. 76–1601. FOODSERVICE & LODGING INSTITUTE, INC., ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 127, 549 F. 2d 829.

No. 76–1602. CALIFORNIA EX REL. DEPARTMENT OF TRANSPORTATION *v.* UNITED STATES EX REL. DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1388.

No. 76–1605. SECURITY MUTUAL CASUALTY CO. *v.* CENTURY CASUALTY CO. C. A. 10th Cir. Certiorari denied.

No. 76–1611. SCHARF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 1124.

No. 76–1612. SCRUGGS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 1097.

No. 76–1613. FISHER *v.* ROBINSON. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 565.

No. 76–1614. SIBLEY *v.* TANDY CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 540.

No. 76–1615. JOHNSTON, A MINOR, BY BRYSON ET UX., GENERAL GUARDIANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 312.

No. 76–1617. ORDNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 554 F. 2d 24.

No. 76–1620. HARNETT, SUPERINTENDENT OF INSURANCE OF NEW YORK *v.* AZZARO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 93.

No. 76–1623. FIDELITY CORP. *v.* REGAL WARE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 2d 934.

No. 76–1622. ROTTENBERG *v.* SULMEYER ET AL., TRUSTEES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 313.

No. 76–1626. WRIGHT ET AL. *v.* BAILEY, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 737.

No. 76–1627. TEMPE ELEMENTARY SCHOOL DISTRICT No. 3 ET AL. *v.* BERNASCONI. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 857.

No. 76–1628. CHISHOLM-RYDER CO., INC., ET AL. *v.* LEWIS MANUFACTURING CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1159.

No. 76–1630. CHANEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1306.

No. 76–1631. ROSENWASSER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 806.

No. 76–1632. HENDERSON ET AL. *v.* MANN THEATRES CORPORATION OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 65 Cal. App. 3d 397, 135 Cal. Rptr. 266.

No. 76–1633. GARRIGAN *v.* GIESE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 35.

No. 76–1635. REILLY ET AL. *v.* ROBERTSON ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 266 Ind. 29, 360 N. E. 2d 171.

No. 76–1636. ARIZONA STATE DENTAL ASSN. ET AL. *v.* BODDICKER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 626.

No. 76–1637. EXECUTIVE AERO, INC. *v.* BAACT CORP. Sup. Ct. Minn. Certiorari denied. Reported below: 312 Minn. 143, 251 N. W. 2d 107.

No. 76–1639. RAMSEY *v.* THE MODOC ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 908.

No. 76–1641. ROSNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 549 F. 2d 259.

No. 76–1642. SEARS, ROEBUCK & CO. *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 180 U. S. App. D. C. 202, 553 F. 2d 1378.

No. 76–1643. MAGAVERN, EXECUTOR AND TRUSTEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 797.

No. 76–1646. KEARNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 314.

No. 76–1648. MILLROOD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 76–1649. MOVERS & WAREHOUSEMEN'S ASSOCIATION OF METROPOLITAN WASHINGTON, D. C., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 2d 962.

No. 76–1652. MOUNT WILSON F. M. BROADCASTERS, INC. *v.* FOX ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–1654. BROWNSELL ET UX. *v.* DAVIDSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 554.

No. 76–1655. RICKENBACKER *v.* WARDEN, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 62.

No. 76–1657. MACKETHAN, RECEIVER *v.* BURRUS, COOTES & BURRUS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 545 F. 2d 1388.

No. 76–1659. GUTTELMAN *v.* STEWART ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 353.

No. 76–1658. DYNAMIC MACHINE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 1195.

No. 76–1664. GAMA-GARCIA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 556 F. 2d 584.

No. 76–1667. MONROE ET AL. *v.* GRAY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 94.

No. 76–1669. DELTA STEAMSHIP LINES, INC. *v.* TURNER; and

No. 76–1687. TURNER *v.* DELTA STEAMSHIP LINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 676.

No. 76–1670. PERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 524.

No. 76–1671. UNITED STATES *v.* DEMARCO. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 1224.

No. 76–1679. BATON ROUGE WATER WORKS CO. *v.* LOUISIANA PUBLIC SERVICE COMMISSION. Sup. Ct. La. Certiorari denied. Reported below: 342 So. 2d 609.

No. 76–1680. RELF ET AL. *v.* GASCH, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied.

No. 76–1682. HARTMAN *v.* HARTMAN. Sup. Ct. Pa. Certiorari denied. Reported below: 469 Pa. 82, 364 A. 2d 914.

No. 76–1683. NATIONAL BARREL & DRUM ASSN., INC. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76–1684. SUPER TIRE ENGINEERING CO. ET AL. *v.* MCCORKLE, COMMISSIONER, DEPARTMENT OF INSTITUTIONS AND AGENCIES OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 550 F. 2d 903.

No. 76–1686. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 554.

No. 76–1689. H. R. MORGAN, INC., ET AL. *v.* UNITED STATES EX REL. MISSISSIPPI ROAD SUPPLY CO. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 262.

No. 76–1691. MATASSINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 362.

No. 76–1695. ECKMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 76–1696. HAKIM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 76–1697. MACDERMID, INC. *v.* SOUTHERN CALIFORNIA CHEMICAL CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 807.

No. 76–1698. MAYFIELD *v.* PHELPS. Sup. Ct. Ky. Certiorari denied. Reported below: 546 S. W. 2d 433.

No. 76–1700. ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1032.

No. 76–1702. ROCHFORD ET AL. *v.* ALLIANCE TO END REPRESSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1031.

No. 76–1703. DURHAM HOSIERY MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 280, 551 F. 2d 466.

No. 76–1707. HUERTA *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 212 Ct. Cl. 473, 548 F. 2d 343.

No. 76–1708. STERN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 76–1709. ARTHUR YOUNG & CO. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 686.

No. 76–1711. UNDERWOOD ET AL. *v.* LOUISIANA. 4th Jud. Dist. Ct. La., Ouachita Parish. Certiorari denied.

No. 76–1713. KENDALL *v.* BETHLEHEM STEEL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 307.

No. 76–1715. SILETTI *v.* NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 559.

No. 76–1716. LIPSITZ ET AL. *v.* COSTELLO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 1267.

No. 76–1717. CHICKASHA COTTON OIL CO. ET AL. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 562 P. 2d 507.

No. 76–1720. DALEY *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 469.

No. 76–1724. FEDERAL COMMUNICATIONS COMMISSION *v.* HOME BOX OFFICE, INC., ET AL.;

No. 76–1841. AMERICAN BROADCASTING COMPANIES, INC. *v.* HOME BOX OFFICE, INC., ET AL.; and

No. 76–1842. NATIONAL ASSOCIATION OF BROADCASTERS *v.* HOME BOX OFFICE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 142, 567 F. 2d 9.

No. 76–1722. HIGGINBOTHAM, ADMINISTRATRIX, ET AL. *v.* MOBIL OIL CORP. ET AL.; and

No. 76–1725. LONG, ADMINISTRATRIX *v.* BELL HELICOPTER CO. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 422.

No. 76–1728. KOWALIK *v.* GENERAL MARINE TRANSPORT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 770.

No. 76–1730. RICHARDSON *v.* SPAHR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1163.

No. 76–1731. DYBA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 554 F. 2d 417.

No. 76–1732. KALVAR CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 211 Ct. Cl. 192, 543 F. 2d 1298.

No. 76–1733. NABHAN ET AL. *v.* ABDULLA ET AL. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 359 N. E. 2d 650.

No. 76–1736. MEYER *v.* FRANK, COMMISSIONER OF POLICE OF NASSAU COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 726.

No. 76–1740. MIDWEST HANGER CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 550 F. 2d 1101.

No. 76–1742. HALTERMAN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 251 N. W. 2d 257.

No. 76–1743. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 2d 1193.

No. 76–1744. BARNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1168.

No. 76–1745. BAGERIS ET AL. *v.* MCGREGOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 580.

No. 76–1746. WILSON *v.* BICCUM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 676.

No. 76–1747. FLEMING, EXECUTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 872.

No. 76–1748. RIFFE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1013.

No. 76–1749. WATERMAN *v.* WRAY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–1751. LEMOS-OLAYA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 76–1752. BERRY ET VIR *v.* HINDS COUNTY, MISSISSIPPI, Sup. Ct. Miss. Certiorari denied. Reported below: 344 So. 2d 146.

No. 76–1753. CONLIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 534.

No. 76–1754. KISHPAUGH *v.* DISTRICT OF COLUMBIA GOVERNMENT ET AL. Ct. App. D. C. Certiorari denied.

No. 76–1756. NORTON ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 215, 551 F. 2d 821.

No. 76–1758. RASTELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 902.

No. 76–1760. S. D. COHN & CO. ET AL. *v.* WOOLF ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 1252.

No. 76–1761. JOHNSTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 522.

No. 76–1762. MIRMELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 76–1763. LEWANDOWSKI ET AL. *v.* ASHCROFT, ATTORNEY GENERAL OF MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 547 S. W. 2d 470.

No. 76–1764. SHATTERPROOF GLASS CORP. *v.* LIBBEY-OWENS-FORD CO. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 582.

No. 76–1765. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 320.

No. 76–1769. LIBERMAN *v.* CITY OF ST. LOUIS. Sup. Ct. Mo. Certiorari denied. Reported below: 547 S. W. 2d 452.

No. 76–1770. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL–CIO, LOCAL 433 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 634.

No. 76–1771. CALIFORNIA ET AL. *v.* CIVIL AERONAUTICS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 134, 567 F. 2d 1.

No. 76–1772. TENN ET AL. *v.* FIRST HAWAIIAN BANK. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1356.

No. 76–1773. TEXAS INTERNATIONAL AIRLINES, INC., ET AL. *v.* SOUTHWEST AIRLINES CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 84.

No. 76–1774. JACKSON ET AL. *v.* ASSOCIATED HOSPITAL SERVICE OF PHILADELPHIA, AKA BLUE CROSS OF GREATER PHILADELPHIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 795.

No. 76–1775. BENSING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 2d 262.

No. 76–1777. BENSON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 198 Neb. 14, 251 N. W. 2d 659.

No. 76–1780. BONSUKAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied. Reported below: 554 F. 2d 2.

No. 76–1781. LEVE ET AL., DBA QUASHA LAW OFFICE *v.* SCHERING CORP. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 567.

No. 76–1782. CREAMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 555 F. 2d 612.

No. 76–1784. MUSTO ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 2d 894, 391 N. Y. S. 2d 374.

No. 76–1785. FLOWERS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 805.

No. 76–1787. LEVY *v.* COHEN ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 3d 165, 561 P. 2d 252.

No. 76–1788. ST. REGIS PAPER CO. *v.* BEMIS CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 833.

No. 76–1790. KIRSNER ET AL. *v.* REID ET AL. Baltimore City Court of Maryland. Certiorari denied.

No. 76–1791. KAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 491.

No. 76–1793. SANDERS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 189, 563 P. 2d 461.

No. 76–1794. ZELDES, TRUSTEE *v.* MANUFACTURERS HANOVER TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 567 F. 2d 166.

No. 76–1797. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* JOHNSON. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–1798. HOMANS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 2d 1044.

No. 76–1803. SOUTHWEST KENWORTH, INC. *v.* ARIZONA STATE TAX COMMISSION ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 114 Ariz. 433, 561 P. 2d 757.

No. 76–1804. HOTCHNER *v.* DOUBLEDAY & CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 910.

No. 76–1806. GETZ *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. Sup. Ct. N. M. Certiorari denied. Reported below: 90 N. M. 195, 561 P. 2d 468.

No. 76–1808. GORTHY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1051.

No. 76–1812. ROBERTS ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. Reported below: 549 F. 2d 158.

No. 76–1815. VIGLIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 335.

No. 76–1816. TURCO *v.* MONROE COUNTY BAR ASSN. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 554 F. 2d 515.

No. 76–1817. STOCKTON DOOR CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 489.

No. 76–1818. HAMILTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 553 F. 2d 63.

No. 76–1820. BATTEN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 249 N. W. 2d 865.

No. 76–1819. First National Bank in Albuquerque, Guardian *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 552 F. 2d 370.

No. 76–1821. Estate of Chesterton *v.* United States. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 345, 551 F. 2d 278.

No. 76–1823. 28 East Jackson Enterprises, Inc. *v.* Cullerton, Assessor of Cook County, Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 551 F. 2d 1093.

No. 76–1825. Baker *v.* Califano, Secretary of Health, Education, and Welfare, et al. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 855.

No. 76–1829. McDonnel *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1010.

No. 76–1832. Bunyard et al. *v.* Franco, Administratrix, et al. Sup. Ct. Ark. Certiorari denied. Reported below: 261 Ark. 144, 547 S. W. 2d 91.

No. 76–1844. Hamilton *v.* Louisiana State Bar Assn. Sup. Ct. La. Certiorari denied. Reported below: 343 So. 2d 985.

No. 76–1845. Ex parte Moody. Sup. Ct. Ala. Certiorari denied.

No. 76–1846. Arizona Power Authority, Electric District No. 3, Pinal County, Arizona, et al. *v.* Andrus, Secretary of the Interior, et al. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1231.

No. 76–1849. Multi-Medical Convalescent & Nursing Center of Towson *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 2d 974.

No. 76–1850. SEEKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 590.

No. 76–1851. ALLEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 554 F. 2d 398.

No. 76–1853. LARKIN ET UX. *v.* TOWN BOARD OF THE TOWN OF FLEMING ET AL.; and

No. 76–1854. LARKIN ET UX. *v.* FARRELL, TREASURER OF CAYUGA COUNTY, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: No. 76–1853, 52 App. Div. 2d 1068, 384 N. Y. S. 2d 603; No. 76–1854, 52 App. Div. 2d 1069, 384 N. Y. S. 2d 605.

No. 76–1856. HUMBOLDT PLACER MINING CO. *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 622.

No. 76–1857. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 621.

No. 76–1858. ALEXANDER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 740, 391 N. Y. S. 2d 936.

No. 76–1861. FLORIDA BOATSMEN ASSN. ET AL. *v.* DEPARTMENT OF REVENUE OF FLORIDA ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 324 So. 2d 651.

No. 76–1862. DOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1068.

No. 76–1863. SHORE, DBA SHORE OIL PRODUCTS, ET AL. *v.* LONGVIEW REFINING CO. ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 554 F. 2d 1006.

No. 76–1864. SAVE OUR WETLANDS, INC. (SOWL), ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 1021.

No. 76–1865. DEBOLES *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 552 F. 2d 1005.

No. 76–1866. KORBAR *v.* HITE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 43 Ill. App. 3d 636, 357 N. E. 2d 135.

No. 76–1867. ROSEE *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 43 Ill. App. 3d 203, 356 N. E. 2d 1012.

No. 76–1868. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 388. C. A. 7th Cir. Certiorari denied. Reported below: 548 F. 2d 704.

No. 76–1869. AMALGAMATED TRANSIT UNION, DIVISION 1384, AFL–CIO, ET AL. *v.* GREYHOUND LINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 1237.

No. 76–1872. WHITAKER *v.* PIERCE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 44 Ill. App. 3d 148, 358 N. E. 2d 61.

No. 76–6379. POSNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 310.

No. 76–6380. TULEY *v.* UNITED STATES; and
No. 76–6807. OLLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 1264.

No. 76–6384. HARPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 2d 610.

No. 76–6391. HENRY *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 516.

No. 76–6418. GOODYEAR *v.* DELAWARE CORRECTIONAL CENTER. C. A. 3d Cir. Certiorari denied.

No. 76–6440. PADUANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 145.

No. 76–6479. POLK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 2d 1265.

No. 76–6496. YBARRA *v.* NEVADA STATE EMPLOYEES FEDERAL CREDIT UNION. Sup. Ct. Nev. Certiorari denied.

No. 76–6522. LONDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6530. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1166.

No. 76–6533. MILLER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 353.

No. 76–6536. GREATHOUSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 2d 225.

No. 76–6545. BYRD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6568. MCGHEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 310.

No. 76–6570. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 563.

No. 76–6572. BACKERT, AKA TALLENT *v.* WALKER, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 342 So. 2d 671.

No. 76–6573. BUSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6581. WENSTROM ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 43 Ill. App. 3d 250, 356 N. E. 2d 1165.

No. 76–6585. CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 898.

No. 76–6593. CLARK *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 212 Ct. Cl. 590, 553 F. 2d 104.

No. 76–6603. SHANNON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 570.

No. 76–6610. MEDINA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 181.

No. 76–6615. GUILLETTE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 743.

No. 76–6621. BARON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 354.

No. 76–6624. SIGMAN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 42 Ill. App. 3d 624, 356 N. E. 2d 400.

No. 76–6629. HAZZARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 566.

No. 76–6631. DUNBAR *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 76–6632. EVERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 580.

No. 76–6634. MCCLAIN ET AL. *v.* UNITED STATES; and
No. 76–6684. READDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: No. 76–6634, 553 F. 2d 97; No. 76–6684, 553 F. 2d 98.

No. 76–6636. LONDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1283.

No. 76–6645. CHIARINI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–6646. FREEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 76–6651. LEONARD *v.* DAY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–6652. SUDLER *v.* DELAWARE. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 570.

No. 76–6654. MASTERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 76–6655. HORGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 F. 2d 1204.

No. 76–6660. JONES *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 995.

No. 76–6661. DINSIO *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 76–6665. PREWITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 2d 1082.

No. 76–6666. MORRISON *v.* SIGLER ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–6670. FEATHERSTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6673. DiSILVESTRO *v.* VETERANS' ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 555.

No. 76–6678. WIGGINS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76–6680. BLACKBURN *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1167.

No. 76–6682. MELNYCZENKO *v.* HEWITT, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 76–6685. KELLEY *v.* BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 353.

No. 76–6686. FRIAS-DELEON *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 142.

No. 76–6692. EDMONDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 76–6696. CARDALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 2d 604.

No. 76–6698. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 320.

No. 76–6703. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 277.

No. 76–6705. WARD *v.* HOPPER, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied.

No. 76–6706. LAGRONE *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–6721. GREEN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 75 Wis. 2d 631, 250 N. W. 2d 305.

No. 76–6724. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 582.

No. 76–6730. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1035.

No. 76–6731. MOODY *v.* MOODY. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 309, 232 S. E. 2d 841.

No. 76–6734. DUPART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 862.

No. 76–6736. ASH *v.* WYOMING. Sup. Ct. Wyoming. Certiorari denied. Reported below: 555 P. 2d 221 and 560 P. 2d 369.

No. 76–6737. ZAMBRANO *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 63.

No. 76–6739. SMITH *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 309.

No. 76–6741. JACKSON *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 260.

No. 76–6745. CARTER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 446, 233 S. E. 2d 201.

No. 76–6748. BRUNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 348.

No. 76–6751. HALL *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 76–6753. SOCRATES *v.* BALSON, HOSPITAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 76–6757. STEVENS *v.* WEST VALLEY JOINT COMMUNITY COLLEGE DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 808.

No. 76–6758. LOVITZ *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 39 Ill. App. 3d 624, 350 N. E. 2d 276.

No. 76–6759. NICOL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–6761. HOLT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6762. KIMMONS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 338 So. 2d 239.

No. 76–6765. CYPHERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 2d 1064.

No. 76–6770. STOKES *v.* TRACEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 76–6771. DIXON *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 76–6773. PERRY *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 94.

No. 76–6775. AUSTIN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 344 So. 2d 1188.

No. 76–6778. ESCOBAR-NEGRON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–6780. GRAVINA *v.* MEACHUM, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 559 F. 2d 1200.

No. 76–6781. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 582.

No. 76–6782. CURAN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 260 Ark. 461, 541 S. W. 2d 923.

No. 76–6785. VINCENT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 76–6788. BATEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6789. BATEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6790. BATEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6791. TALIAFERRO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6792. WILEY *v.* DAGGETT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 776.

No. 76–6793. MEEKS *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 134.

No. 76–6795. EASTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 230.

No. 76–6796. FORSBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 589.

No. 76–6797. WILLIAMS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 354.

No. 76–6800. LYNOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76–6803. VAVRA *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–6804. PHELPS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 266 Ind. 66, 360 N. E. 2d 191.

No. 76–6805. SMILEY *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 76–6808. STROUD *v.* DELTA AIR LINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 892.

No. 76–6809. JACQUES *v.* HILTON, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 76–6810. SELBY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 584, 391 N. Y. S. 2d 189.

No. 76–6811. CARTER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 76–6812. SPRIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 368.

No. 76–6813. TAYLOR *v.* CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 2d 39.

No. 76–6814. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 572.

No. 76–6815. GILLIHAN *v.* RODRIGUEZ, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 2d 1182.

No. 76–6816. BOWLES *v.* STRICKLAND, CORRECTIONAL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 199, 556 F. 2d 76.

No. 76–6817. HERNANDEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 76–6819. STIMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1286.

No. 76–6820. CAIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 549 S. W. 2d 707.

No. 76–6826. WEATHINGTON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 345 So. 2d 429.

No. 76–6831. ANGUS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 76 Wis. 2d 191, 251 N. W. 2d 28.

No. 76–6833. HALL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 342 So. 2d 616.

No. 76–6835. BOLTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 368.

No. 76–6836. TRIMBLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 550 S. W. 2d 707.

No. 76–6839. DOWNING *v.* DISTRICT ATTORNEY OF NORTHAMPTON COUNTY. Super. Ct. Pa. Certiorari denied. Reported below: 241 Pa. Super. 592, 360 A. 2d 671.

No. 76–6840. COLE *v.* WAINRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 345 So. 2d 421.

No. 76–6842. LOTER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 151.

No. 76–6844. STONE *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6845. CARTER *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–6846. WHITE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 76–6848. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1405.

No. 76–6849. SUTTON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 558 P. 2d 1193.

No. 76–6851. MILLER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 345 So. 2d 630.

No. 76–6855. SIMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 368.

No. 76–6859. FORD *v.* REES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 76–6861. CHIARELLO *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 76–6862. CASTANEDA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 555 F. 2d 605.

No. 76–6863. DEFREITAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 76–6864. GOLSTON *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 76–6865. PURDY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 343 So. 2d 4.

No. 76–6868. BROWN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 172 Conn. 531, 375 A. 2d 1024.

No. 76–6869. MASON *v.* GAGNON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 76–6871. DAVIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 367 A. 2d 1254.

No. 76–6874. WHITE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 1137.

No. 76–6876. ANDERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 568.

No. 76–6877. PADILLA-MARTINEZ *v.* UNITED STATES; and No. 76–6878. NAVAS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 2d 435.

No. 76–6879. SMITH *v.* MCNICHOL ET AL. Pa. Commw. Ct. Certiorari denied.

No. 76–6881. ENGLISH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1225.

No. 76–6883. ZAKRAJSEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1224.

No. 76–6884. WRIGHT *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6885. WOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 576.

No. 76–6886. OWENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 1053.

No. 76–6887. KASOLD *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1069.

No. 76–6888. GILBERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 76–6889. DAY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 76 Wis. 2d 588, 251 N. W. 2d 811.

No. 76–6890. TOSTI ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6891. STARKEY *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 555 F. 2d 1352.

No. 76–6892. TALTON *v.* MANSON, CORRECTION COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–6893. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 552 F. 2d 566.

No. 76–6895. BEARDSLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 76–6896. WINDHAM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 3d 121, 560 P. 2d 1187.

No. 76–6898. BURDEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–6899. BEARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1205.

No. 76–6900. BASSETT *v.* McCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 616.

No. 76–6901. RUTHERFORD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 862.

No. 76–6902. HENDRIX *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 214 Ct. Cl. 50, 555 F. 2d 785.

No. 76–6903. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 828 and 554 F. 2d 893.

No. 76–6904. HIPP *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 75 Wis. 2d 621, 250 N. W. 2d 299.

No. 76–6905. WELLS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 76–6906. HAJAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 555 F. 2d 558.

No. 76–6908. SMITH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 547 S. W. 2d 925.

No. 76–6909. ROSARIO *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. Ct. App. N. Y. Certiorari denied.

No. 76–6910. SMALLWOOD *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 277 Ore. 503, 561 P. 2d 600.

No. 76–6911. HARRIS *v.* ZAHRADNICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 936.

No. 76–6912. HARDY *v.* JAMISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 306.

No. 76–6913. KINSLEY *v.* BRENT, DBA SAFEWAY FINANCE CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 1154.

No. 76–6914. JACKSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 292 N. C. 203, 232 S. E. 2d 407.

No. 76–6915. COUSIN *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 897.

No. 76–6917. JOHNSTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 1238.

No. 76–6918. BRINLEE *v.* CRISP, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 76–6919. WEGER *v.* BRIERTON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1032.

No. 76–6920. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 1080.

No. 76–6921. HOUSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 756.

No. 76–6922. BARKER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–6923. GWINN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 97.

No. 76–6925. GEHRMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 579, 391 N. Y. S. 2d 621.

No. 76–6927. BOWDACH *v.* HAVENS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 39.

No. 76–6928. STOLARZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 488.

No. 76–6929. FLOYD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 555 F. 2d 45.

No. 76–6930. MOSLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 555 F. 2d 191.

No. 76–6931. LONDON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 567 and 568.

No. 76–6932. VINES *v.* MUNCY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 342.

No. 76–6934. WETHERINGTON *v.* JAMES, JUDGE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 311.

No. 76–6935. EDWARDS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 367.

No. 76–6936. HOUGHTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 554 F. 2d 1219.

No. 76–6937. BENSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 223.

No. 76–6938. TZIMOPOULOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 554 F. 2d 1216.

No. 76–6940. CAMPBELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 1333.

No. 76–6943. CANDIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 305.

No. 76–6944. HEISER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 76–6945. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 76–6947. HODGES *v.* ALEXANDER, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 861.

No. 76–6948. WIGGINS *v.* AARON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 76–6949. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 99.

No. 76–6953. COLLINS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–6954. SCHAFFER *v.* ROBINSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 559.

No. 76–6957. WILKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 76–6960. BLACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1032.

No. 76–6963. DAVIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 76–6964. WOODALL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 281, 551 F. 2d 467.

No. 76–6966. SILO *v.* KANE, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 76–6967. SHAW ET AL. *v.* MERRITT-CHAPMAN & SCOTT CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 554 F. 2d 786.

No. 76–6968. WILLIAMS *v.* LEEKE, CORRECTIONS DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 577.

No. 76–6969. SANCHEZ ET AL. *v.* CARIBBEAN CARRIERS, LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 2d 70.

No. 76–6970. DAVIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 370 A. 2d 1337.

No. 76–6971. SANDS *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–6972. SCOTT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 345 So. 2d 414.

No. 76–6975. MCDOWELL *v.* MORRIS. Super. Ct. Pa. Certiorari denied. Reported below: 241 Pa. Super. 600, 360 A. 2d 674.

No. 76–6976. ROSENBAUM *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 76–6980. LONGORIA-CASTENADA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 2d 233.

No. 76–6984. WHITE *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 563.

No. 76–6991. MASON *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1225.

No. 76–6992. SWANN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 576.

No. 76–6993. GALBO *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 347 So. 2d 964.

No. 76–6994. RAMSEY *v.* UNITED STATES;
No. 77–5037. GREEN *v.* UNITED STATES; and
No. 77–5185. WESLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 1345.

No. 76–6996. WEAVER *v.* CARSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 76–6999. SAMPSON *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 551 F. 2d 881.

No. 76–7000. LUSSIER *v.* GUNTER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 552 F. 2d 385.

No. 76–7001. BEECHER *v.* BAXLEY, ATTORNEY GENERAL OF ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 974.

No. 77–1. MEITZNER ET AL. *v.* MINDICK ET AL. C. C. P. A. Certiorari denied. Reported below: 549 F. 2d 775.

No. 77–2. WAGGONER ET AL. *v.* GRIFFITH CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 1194.

No. 77–4. AMALGAMATED SUGAR CO. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (ANTHONY J. PIZZA FOOD PRODUCTS CORP. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 77–5. BRUNWASSER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 77–6. RUSSELL *v.* BLACK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 582.

No. 77–9. AMERICAN FIDELITY FIRE INSURANCE CO. *v.* SUE KLAU ENTERPRISES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 551 F. 2d 882.

No. 77–13. BLEVINS POPCORN CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–14. BOGLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 589.

No. 77–15. BROOKS *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 615.

No. 77–19. IN RE BOSTON & PROVIDENCE RAILROAD CORP. C. A. 1st Cir. Certiorari denied.

No. 77–20. RINIOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 554 F. 2d 550.

No. 77–21. BARONE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 1038.

No. 77–23. MCLUCAS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 172 Conn. 542, 375 A. 2d 1014.

No. 77–27. LANDMESSER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 553 F. 2d 17.

No. 77–28. IOWA BEEF PROCESSORS, INC. *v.* VALLEY VIEW CATTLE CO. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 1219.

No. 77–29. NEMSER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 558.

No. 77–31. KING *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 214 Ct. Cl. 795, 566 F. 2d 1189.

No. 77–33. TURNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 474.

No. 77–35. KIRSCHENBLATT, AKA KIRSCH, ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 559.

No. 77–36. SABINE TOWING & TRANSPORTATION CO., INC. *v.* ZAPATA UGLAND DRILLING, INC. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 489.

No. 77–40. TONTI *v.* TONTI ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 77–41. CITY OF CLEVELAND *v.* CLEVELAND ELECTRIC ILLUMINATING CO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 50 Ohio App. 2d 275, 363 N. E. 2d 759.

No. 77–48. WALLES *v.* BECHTEL CORP. ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 252 N. W. 2d 701.

No. 77–49. HOLM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 568.

No. 77–51. FUIMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 1155.

No. 77–55. ALLEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–58. CHLEBORAD *v.* CHARTER, ASSIGNEE. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 246.

No. 77–60. NATIONAL RAILROAD PASSENGER CORP. *v.* BLANCHETTE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 551 F. 2d 127.

No. 77–66. CUGLIATA ET AL. *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 372 A. 2d 1019.

No. 77–68. PARKING REALTY CO. ET AL. *v.* SHERLINE. Sup. Ct. Mich. Certiorari denied.

No. 77–71. DINEEN ET AL. *v.* BILANDIC. C. A. 7th Cir. Certiorari denied. Reported below: 556 F. 2d 584.

No. 77–72. WEST *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 252 N. W. 2d 457.

No. 77–73. PILLSBURY CO. ET AL. *v.* DONALDSON. C. A. 8th Cir. Certiorari denied. Reported below: 554 F. 2d 825.

No. 77–75. SYSTEMATIC TOOL & MACHINE CO. ET AL. *v.* WALTER KIDDE & CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 555 F. 2d 342.

No. 77–76. SMITH ET UX. *v.* VILLAGE OF LAGRANGE. Ct. App. Ohio, Ashland County. Certiorari denied.

No. 77–78. MCFADDEN *v.* G. H. MCSHANE CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 554 F. 2d 111.

No. 77–80. POLIN *v.* CONDUCTRON CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 797.

No. 77–82. CICHANSKI *v.* HONEYWELL, INC. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1171.

No. 77–87. KAMA CORP. *v.* LOCAL NO. 1451, U. A. W., INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 566.

No. 77–89. LUCOM *v.* REID ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 862.

No. 77–90. ALFONSO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 605.

No. 77–92. TAYLOR INDUSTRIES, INC. *v.* PANDUIT CORP. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 581.

No. 77–95. CONTINENTAL ACCEPTANCE CORP. *v.* RIVERA. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 50 Ohio App. 2d 338, 363 N. E. 2d 772.

No. 77–98. CALIFORNIA, BY AND THROUGH THE DEPARTMENT OF TRANSPORTATION *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 329, 551 F. 2d 843.

No. 77–100. ATWELL *v.* O'CONNELL ET AL. C. A. 6th Cir. Certiorari denied.

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No. 77–101. ALLEN ET AL. *v.* PITTENGER, SECRETARY OF EDUCATION OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 564.

No. 77–102. KEHN ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 50 Ohio St. 2d 11, 361 N. E. 2d 1330.

No. 77–105. FINKELSTEIN ET AL. *v.* TRANS WORLD AIRLINES, INC. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 647, 391 N. Y. S. 2d 998.

No. 77–107. WESTERN PHARMACAL CO. *v.* AMFAC DISTRIBUTING CORP., DBA WESTERN DRUG SUPPLY CO. C. A. 10th Cir. Certiorari denied.

No. 77–108. DINAPOLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 557 F. 2d 962.

No. 77–109. WILSON ET AL. *v.* HINKLE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 67 Cal. App. 3d 506, 136 Cal. Rptr. 731.

No. 77–110. BYERLY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 77–111. PEOPLES NATIONAL BANK OF NEW JERSEY *v.* STONEHILL ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 73 N. J. 88, 372 A. 2d 1096.

No. 77–112. REA EXPRESS, INC. *v.* TRAVELERS INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 180 U. S. App. D. C. 341, 554 F. 2d 1200.

No. 77–113. IN RE MEAD. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 372 Mass. 253, 361 N. E. 2d 403.

No. 77–122. SIMS ET AL. *v.* WESTERN STEEL CO. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 2d 811.

No. 77–124. OVERSEAS OIL CARRIERS, INC. *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 830.

No. 77–129. NATIONAL MICRONETICS, INC. *v.* U. S. PHILIPS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 716.

No. 77–130. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. *v.* AAACON AUTO TRANSPORT, INC. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 951, 363 N. E. 2d 359.

No. 77–140. KIWANIS CLUB OF GREAT NECK, INC., ET AL. *v.* BOARD OF TRUSTEES OF KIWANIS INTERNATIONAL ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 1034, 363 N. E. 2d 1378.

No. 77–141. EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. *v.* MOCH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 594.

No. 77–144. ARIZONA *v.* PHELPS DODGE CORP. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 1383.

No. 77–147. HOZIE ET UX. *v.* HOZIE. Sup. Ct. Va. Certiorari denied.

No. 77–148. BRITT ET AL. *v.* SAN DIEGO UNIFIED PORT DISTRICT ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 67 Cal. App. 3d 361, 136 Cal. Rptr. 557.

No. 77–149. FITZGERALD *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 195, 556 F. 2d 72.

No. 77–151. MANGURIAN ET AL. *v.* THOMPSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 1029.

No. 77–153. SCHIFFMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 1124.

No. 77–155. BALLARD, DBA BALLARD'S DAIRY QUEEN *v.* BURGER TRAIN SYSTEMS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 552 F. 2d 1377.

No. 77–156. MILGO ELECTRONIC CORP. ET AL. *v.* CODEX CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 553 F. 2d 735.

No. 77–157. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION No. 186 *v.* MCNALL BUILDING MATERIALS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 586.

No. 77–158. NORFOLK & WESTERN RAILWAY CO. *v.* WHITE. Sup. Ct. Va. Certiorari denied. Reported below: 217 Va. 823, 232 S. E. 2d 807.

No. 77–168. KAMEI-AUTOKOMFORT ET AL. *v.* EURASIAN AUTOMOTIVE PRODUCTS. C. A. 9th Cir. Certiorari denied. Reported below: 553 F. 2d 603.

No. 77–170. RIEBOLD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 557 F. 2d 697.

No. 77–171. FRANKFORD HOSPITAL *v.* BLUE CROSS OF GREATER PHILADELPHIA. C. A. 3d Cir. Certiorari denied. Reported below: 554 F. 2d 1253.

No. 77–173. MOONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 1038.

No. 77–177. PROVIDENT LIFE & ACCIDENT INSURANCE CO. *v.* ZAWACKI. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 77–179. AMPEREX ELECTRONIC CORP. *v.* NEW YORK RACING ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 740.

No. 77–184. ERNEST, NEXT FRIEND OF UNBORN CHILD ROE *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–186. PORRO *v.* WOODCOCK, PROSECUTOR OF BERGEN COUNTY, ET AL. Super. Ct. N. J. Certiorari denied.

No. 77–188. GLAZNER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 341 So. 2d 1091.

No. 77–191. DONAHUE ET AL. *v.* BOARD OF ELECTIONS OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1202.

No. 77–197. SCHANBARGER *v.* MARINE MIDLAND BANK-CENTRAL, EXECUTOR. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 2d 817, 390 N. Y. S. 2d 610.

No. 77–198. HURST ET AL. *v.* TRIAD SHIPPING CO. C. A. 3d Cir. Certiorari denied. Reported below: 554 F. 2d 1237.

No. 77–199. GUNNE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 66 Mich. App. 318, 239 N. W. 2d 603.

No. 77–205. MARX ET AL. *v.* DINERS' CLUB, INC. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 505.

No. 77–209. WATKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 903.

No. 77–224. ZIMMERMAN ET UX. *v.* EBER ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–232. LIPUMA *v.* CORRECTIONS COMMISSIONER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 84.

No. 77–238. MICHIGAN *v.* MOSLEY. Sup. Ct. Mich. Certiorari denied. Reported below: 400 Mich. 181, 254 N. W. 2d 29.

No. 77–251. LOCAL UNION No. 657, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA OF SHEBOYGAN COUNTY *v.* SIDELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 1250.

No. 77–288. SMYTH *v.* UNITED STATES; and
No. 77–289. BAVOUSETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 823.

No. 77–307. UNITED STATES EX REL. JOHNSTON, DBA L. R. JOHNSTON CO. *v.* GENERAL INSURANCE COMPANY OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 39.

No. 77–319. SICA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 560 F. 2d 149.

No. 77–320. COAST OF MAINE LOBSTER CO., INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 557 F. 2d 905.

No. 77–329. POLK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 803.

No. 77–5003. MCBRYAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 433.

No. 77–5005. WINGARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 577.

No. 77–5006. WALKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1035.

No. 77–5007. RAITPORT *v.* DELAWARE VALLEY SMALL BUSINESS INVESTMENT CORP. ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–5008. ESCALANTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 970.

No. 77–5010. MALLOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 97.

No. 77–5012. WILLIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–5013. RODRIGUEZ *v.* WALLENSTEIN. C. A. 7th Cir. Certiorari denied.

No. 77–5015. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 446.

No. 77–5017. FLEETWOOD *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 306.

No. 77–5023. LEE *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1220.

No. 77–5024. GOODSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 564 P. 2d 260.

No. 77–5027. OGROD *v.* OGROD. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 568.

No. 77–5030. VERDUGO *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 114 Ariz. 477, 561 P. 2d 1249.

No. 77–5032. MCFERRAN *v.* BOARD OF EDUCATION FOR THE ENLARGED CITY SCHOOL DISTRICT OF TROY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–5035. CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 77–5038. LINDEN *v.* SCHWARTZ ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–5039. CHATMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 2d 147.

No. 77–5040. KRAMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 261.

No. 77–5041. CRAFT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 77–5043. BASS *v.* SULLIVAN, CORRECTIONS COMMISSIONER, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 229.

No. 77–5045. CLARK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 612, 363 N. E. 2d 319.

No. 77–5047. GORDY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–5048. DUDAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5050. MUNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5051. LOWE *v.* HOOVER. Sup. Ct. Alaska. Certiorari denied. Reported below: 564 P. 2d 1222.

No. 77–5052. PALMER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 344 So. 2d 964.

No. 77–5053. SHAW *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 77–5054. FAIR *v.* CITY OF TAMPA ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–5056. NEARY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 1184.

No. 77–5058. GREENE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 368.

No. 77–5060. ABBITT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–5062. FULTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 575.

No. 77–5064. BETTKER *v.* WHITLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1219.

No. 77–5067. DIGGS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–5068. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 566.

No. 77–5071. CLIFTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–5072. KENNEDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 608.

No. 77–5073. MCCANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 474.

No. 77–5075. WILLIAMS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1036.

No. 77–5076. CATANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 497.

No. 77–5077. WILLIAMS *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 77–5078. FLETCHER *v.* HOWARD, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 77–5079. CORNISH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 575.

No. 77–5080. BUTLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 221.

No. 77–5082. YATES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 554 F. 2d 342.

No. 77–5085. VASQUEZ-GUERRERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 917.

No. 77–5086. ROMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–5087. MATA *v.* AARON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 77–5088. GRAMLICH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 1359.

No. 77–5089. GWIN *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 77–5091. MORGAN *v.* MOYLE. C. A. 9th Cir. Certiorari denied.

No. 77–5094. NAMENSON *v.* VALLENCOURT. C. A. 1st Cir. Certiorari denied. Reported below: 555 F. 2d 1067.

No. 77–5096. CARTER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 266 Ind. 196, 361 N. E. 2d 1208.

No. 77–5098. UPTAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 1107 and 1108.

No. 77–5100. PANKEY ET AL. *v.* BORDENKIRCHER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 582.

No. 77–5102. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 251.

No. 77–5103. OLIVAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 558 F. 2d 1366.

No. 77–5108. BROUSSARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 550 S. W. 2d 706.

No. 77–5109. NUNEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5110. MCDONALD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 77–5113. VANASCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 557 F. 2d 13.

No. 77–5114. OWENS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 244 Pa. Super. 581, 371 A. 2d 862.

No. 77–5117. HOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 77–5119. NAILS *v.* LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 39.

No. 77–5121. BRIGHTWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–5122. HAYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 824.

No. 77–5123. NOLEN *v.* OWENS, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 77–5126. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1033.

No. 77–5127. BARTLETT *v.* O'DELL ET AL. C. A. 6th Cir. Certiorari denied.

No. 77–5129. HUDSON *v.* ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1203.

No. 77–5130. REESE *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 77–5131. QUARELS *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 77–5132. GRIPPE *v.* FRANK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 556.

No. 77–5135. BRADLEY *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1219.

No. 77–5136. CORBITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 569.

No. 77–5137. RANSOM *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 900.

No. 77–5139. PIERSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 498, 565 P. 2d 270.

No. 77–5144. KROHN, AKA LEWANDOWSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 390.

No. 77–5147. VALERIO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 77–5153. HENDERSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5154. PRATT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1390.

No. 77–5158. MILLS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 557.

No. 77–5160. CARUSO *v.* EVANS, PENITENTIARY SUPERINTENDENT. C. A. 10th Cir. Certiorari denied.

No. 77–5162. PETTY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5167. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1390.

No. 77–5169. AARON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 345 So. 2d 641.

No. 77–5170. NASIM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 34 Md. App. 65, 366 A. 2d 70.

No. 77–5178. SIMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–5181. TOPE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 266 Ind. 239, 362 N. E. 2d 137.

No. 77–5182. SUNDAY *v.* UNITED STATES DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 77–5186. HOLSEY *v.* MARYLAND INMATE GRIEVANCE COMMISSION. City Ct. of Baltimore, Md. Certiorari denied.

No. 77–5195. WHITEHEAD *v.* FLAMEGAS COMPANIES, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–5197. LEVERITTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 462.

No. 77–5199. PISA *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 363 N. E. 2d 245.

No. 77–5200. LIPTROTH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 342 So. 2d 959.

No. 77–5201. COLLINS *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1202.

No. 77–5202. MANGIOPANE *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1220.

No. 77–5203. STEPHENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 77–5204. MURRAY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–5208. TOLIVER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5209. HILL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 268 S. C. 390, 234 S. E. 2d 219.

No. 77–5211. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 460.

No. 77–5213. FAHRIG *v.* JENEFSKY. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 77–5217. FLANNERY *v.* MONTGOMERY COUNTY PROBATION DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–5218. CABRAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 363.

No. 77–5222. IN RE FRANCISCUS. Sup. Ct. Pa. Certiorari denied. Reported below: 471 Pa. 53, 369 A. 2d 1190.

No. 77–5227. HENDERSON *v.* METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY. Ct. App. Ga. Certiorari denied. Reported below: 141 Ga. App. 509, 233 S. E. 2d 817.

No. 77–5230. GALLAGHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 557 F. 2d 1041.

No. 77–5232. FAHRIG ET AL. *v.* LEDFORD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 800.

No. 77–5235. WARRINER *v.* FLORIDA ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–5238. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 900.

No. 77–5242. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 166.

No. 77–5245. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 2d 1249.

No. 77–5251. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 243.

No. 77–5253. WALLACE *v.* PAN AMERICAN AIRWAYS. C. A. D. C. Cir. Certiorari denied.

No. 77–5254. MILLS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 119.

No. 77–5264. GILLENTINE *v.* HANCOCK TEXTILE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 39.

No. 77–5265. BONDURANT, AKA GRANT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1328.

No. 77–5270. ROLISON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 473 Pa. 261, 374 A. 2d 509.

No. 77–5275. TERRY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–5279. JENNINGS *v.* DAY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 77–5280. PEDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 278.

No. 77–5282. ANDRESS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5283. THERIAULT ET AL. *v.* SILBER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 1279.

No. 77–5289. KLEINBART *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 129, 561 F. 2d 1022.

No. 77–5297. CRUZ-VALENZUELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5302. DE MARO ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 557 F. 2d 596.

No. 77–5304. BUBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 567 F. 2d 192.

No. 77–5307. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 1303.

No. 77–5311. SHORT, AKA BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1210.

No. 77–5313. EVANS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5314. DUKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 77–5315. GARCIA *v.* GILMAN, DISTRICT ATTORNEY OF CAMERON COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1063.

No. 77–5316. GRIFFIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–5319. CRIDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5325. MATLOCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1328.

No. 77–5341. HANCOCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1300.

No. 77–5348. TAPLIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 544.

No. 77–5362. CISNEROS-JIMINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 1038.

No. 77–5363. FLOWERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 558 F. 2d 1231.

No. 77–5364. FAIRFAX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5366. KILBOURNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1263.

No. 76–1339. PARRATT, WARDEN, ET AL. *v.* SELL ET AL. C. A. 8th Cir. Motion of respondent Konder for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 548 F. 2d 753.

No. 76–1511. ILLINOIS *v.* POLITO. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 42 Ill. App. 3d 372, 355 N. E. 2d 725.

No. 76–1540. JAGO, CORRECTIONAL SUPERINTENDENT *v.* WEBB. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis granted.* Certiorari denied. Reported below: 549 F. 2d 1081.

No. 76–1729. OTTO CONSTRUCTION CORP. *v.* BOCK, ADMINISTRATRIX. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 556 F. 2d 564.

No. 76–1792. SHAW, DISTRICT CLERK OF DALLAS COUNTY, TEXAS *v.* CLAYTON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 548 F. 2d 1155.

No. 77–160. KETTE, CORRECTIONAL SUPERINTENDENT *v.* Moss. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 555 F. 2d 137.

No. 77–161. GUNTER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* LUSSIER. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 552 F. 2d 385.

No. 77–226. MITCHELL, WARDEN *v.* HEALEY. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 553 F. 2d 1052.

No. 76–1371. SEABOARD COAST LINE RAILROAD CO. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL.; and

No. 76–1400. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 539 F. 2d 386.

No. 76–1675. NORTH CAROLINA UTILITIES COMMISSION ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 76–1676. UNITED STATES INDEPENDENT TELEPHONE ASSN. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 76–1677. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 76–1814. UNITED SYSTEM SERVICE, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 552 F. 2d 1036.

No. 76–1721. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.;

No. 76–1795. ANHEUSER-BUSCH, INC. *v.* UNITED STATES ET AL.;

No. 76–1870. AMERICAN BAKERS ASSN. *v.* UNITED STATES ET AL.; and

No. 77–24. BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 549 F. 2d 1186.

No. 76–1860. WEST ET AL. *v.* EXXON CORP. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 543 S. W. 2d 667.

No. 77–22. BUNN, EXECUTRIX *v.* CATERPILLAR TRACTOR CO. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 556 F. 2d 564.

No. 77–83. MEERS *v.* SUNDSTRAND CORP. ET AL.; and
No. 77–255. SUNDSTRAND CORP. *v.* SUN CHEMICAL CORP. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 553 F. 2d 1033.

No. 76–1380. ARADO ET AL. *v.* UNITED STATES; and
No. 76–1390. ADAMS ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 549 F. 2d 415.

No. 77–5172. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 559 F. 2d 1226.

No. 76–1558. DANN, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* NOLL; and
No. 76–1559. DANN, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* CHATFIELD. C. C. P. A. Motion of Computer & Business Equipment Manufacturers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied in No. 76–1558. MR. JUSTICE BLACKMUN would grant certiorari, vacate judgment, and remand case with directions to dismiss case as moot. Certiorari denied in No. 76–1559 as untimely filed. 28 U. S. C. § 2101 (c). Reported below: No. 76–1558, 545 F. 2d 141; No. 76–1559, 545 F. 2d 152.

No. 76–1388. LOWE ET AL. *v.* EUGENE SAND & GRAVEL, INC., ET AL. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 276 Ore. 1007, 558 P. 2d 338.

No. 76–6506. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 88 Wash. 2d 127, 559 P. 2d 970.

No. 76–1565. SOUTHERN OHIO COAL CO. ET AL. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 6th Cir. Motions of Bituminous Coal Operators' Assn., Inc., and Chamber of Commerce of the United States for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 551 F. 2d 695.

No. 76–1663. FREDERICK CONTRACTORS, INC. *v.* METROPOLITAN FEDERAL SAVINGS & LOAN ASSOCIATION OF BETHESDA ET AL. Ct. App. Md. Certiorari denied, it appearing that the judgment below rests on adequate state grounds. Reported below: 279 Md. 483, 369 A. 2d 563.

No. 76–1678. CHRISTENSEN, DIRECTOR OF FOOD AND AGRICULTURE OF CALIFORNIA, ET AL. *v.* FEDERAL TRADE COMMISSION ET AL.; and

No. 76–1705. CALIFORNIA MILK PRODUCERS ADVISORY BOARD ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 549 F. 2d 1321.

No. 76–1694. MOBIL OIL CORP. *v.* LIGHTCAP ET AL. Sup. Ct. Kan. Motion of Northern Distributor Group et al. for leave to file a brief as *amici curiae* granted. Order entered by MR. JUSTICE WHITE on June 15, 1977, staying issuance of mandate of Supreme Court of Kansas is vacated. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this motion, order, and petition. Reported below: 221 Kan. 448, 562 P. 2d 1.

No. 77–70. NATIONAL LABOR RELATIONS BOARD *v.* ALPERS' JOBBING CO. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 547 F. 2d 402.

No. 76–1739. JOHNSON ET AL. *v.* HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied, it appearing that there is no final judgment within the meaning of 28 U. S. C. § 1257.

No. 76–1766. SUNSET SCAVENGER CO. ET AL. *v.* ROBERTS ET AL. C. A. 9th Cir. Certiorari denied as untimely filed. 28 U. S. C. § 2101 (c). Reported below: 556 F. 2d 588.

No. 76–1801. RIVET, ADMINISTRATRIX *v.* J. C. PENNEY CO., INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 550 F. 2d 1283.

No. 76–6998. MASON ET AL. *v.* CALLAWAY ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 554 F. 2d 129.

No. 76–1802. FIRST NATIONAL BANK & TRUST COMPANY OF FARGO *v.* DAKOTA NATIONAL BANK & TRUST CO. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 554 F. 2d 345.

No. 77–46. CORY, CONTROLLER OF CALIFORNIA *v.* FASKEN, EXECUTOR. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 19 Cal. 3d 412, 563 P. 2d 832.

No. 77–207. BOWMAN *v.* SIMPSON. Sup. Ct. Tex. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari.

No. 76–1840. POLUR *v.* THOMSEN, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari and other relief denied. Reported below: 553 F. 2d 97.

No. 76–6334. MIDDLETON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 266 S. C. 251, 222 S. E. 2d 763.

No. 76–6627. MAGDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 547 F. 2d 756.

No. 76–6717. FUNCHESS *v.* FLORIDA. Sup. Ct. Fla.;

No. 76–6756. CHENAULT *v.* STYNCHCOMBE, SHERIFF. C. A. 5th Cir.;

No. 76–6823. NEAL *v.* ARKANSAS. Sup. Ct. Ark.;

No. 76–6933. SIMANTS *v.* NEBRASKA. Sup. Ct. Neb.;

No. 77–5021. COLLINS *v.* ARKANSAS. Sup. Ct. Ark.;

No. 77–5083. ADAMS *v.* FLORIDA. Sup. Ct. Fla.;

No. 77–5099. SMITH, AKA MACHETTI *v.* GEORGIA. Sup. Ct. Ga.;

No. 77–5155. MOORE *v.* GEORGIA. Sup. Ct. Ga.; and

No. 77–5288. SULLIVAN ET AL. *v.* ASKEW, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: No. 76–6717, 341 So. 2d 762; No. 76–6756, 546 F. 2d 1191; No. 76–6823, 261 Ark. 336, 548 S. W. 2d 135; No. 76–6933, 197 Neb. 549, 250 N. W. 2d 881; No. 77–5021, 261 Ark. 195, 548 S. W. 2d 106; No. 77–5083, 341 So. 2d 765; No. 77–5099, 238 Ga. 655, 235 S. E. 2d 375; No. 77–5155, 239 Ga. 67, 235 S. E. 2d 519; No. 77–5288, 348 So. 2d 312.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 76–6738. HEIMERLE *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to file supplement to petition granted. Certiorari denied. Reported below: 556 F. 2d 561.

No. 76–6802. CARMICHAEL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari even though the denial of the petition is without prejudice to the filing of a petition for writ of habeas corpus in the appropriate United States District Court.

No. 76–6834. BLACKMON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 345 So. 2d 420.

No. 77–3. GISH *v.* BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS. Super. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 145 N. J. Super. 96, 366 A. 2d 1337.

No. 77–91. GAYLORD *v.* TACOMA SCHOOL DISTRICT No. 10 ET AL. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 88 Wash. 2d 286, 559 P. 2d 1340.

No. 76–6872. SANDOVAL *v.* UNITED STATES. C. A. 9th Cir. Motions of Aguilar et al. for leave to join in petition denied. Certiorari denied. Reported below: 550 F. 2d 427.

No. 77–118. PACIFIC ENGINEERING & PRODUCTION COMPANY OF NEVADA *v.* KERR-MCGEE CORP. ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 551 F. 2d 790.

No. 77–81. NIXON *v.* DELLUMS ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 182 U. S. App. D. C. 244, 561 F. 2d 242.

No. 77–131. DELAWARE STATE BOARD OF EDUCATION ET AL. *v.* EVANS ET AL.;

No. 77–223. CLAYMONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL.;

No. 77–235. NEWARK SCHOOL DISTRICT *v.* EVANS ET AL.;

No. 77–236. NEW CASTLE-GUNNING BEDFORD SCHOOL DISTRICT *v.* EVANS ET AL.; and

No. 77–239. MARSHALLTON-McKEAN SCHOOL DISTRICT *v.* EVANS ET AL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST would grant petitions for writs of certiorari, vacate the judgment, and remand the cases for further consideration in light of *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977). MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 555 F. 2d 373.

No. 77–136. ALDENS, INC. *v.* LAFOLLETTE, ATTORNEY GENERAL OF WISCONSIN, ET AL. C. A. 7th Cir. Motion of Direct Mail/Marketing Assn., Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 552 F. 2d 745.

Rehearing Denied

No. 75–442. POELKER, MAYOR OF ST. LOUIS, ET AL. *v.* DOE, 432 U. S. 519;

No. 75–1578. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* SYKES, 433 U. S. 72; and

No. 75–1805. JEFFERS *v.* UNITED STATES, 432 U. S. 137. Petitions for rehearing denied.

No. 75–1809. RABINOVITCH *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL., 433 U. S. 901;

No. 75–1844. UNITED STATES *v.* LOVASCO, 431 U. S. 783;

No. 76–156. VENDO CO. *v.* LEKTRO-VEND CORP. ET AL., 433 U. S. 623;

No. 76–220. GENERAL DYNAMICS CORP. *v.* UNITED STATES, 432 U. S. 905;

No. 76–316. BATES ET AL. *v.* STATE BAR OF ARIZONA, 433 U. S. 350;

No. 76–344. COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL–CIO *v.* CHANCE ET AL., 431 U. S. 965;

No. 76–404. ILLINOIS BRICK CO. ET AL. *v.* ILLINOIS ET AL., 431 U. S. 720;

No. 76–984. DRUMMOND ET UX. *v.* DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES OF FULTON COUNTY, ET AL., 432 U. S. 905;

No. 76–1079. LEVC, AKA O'BLAK, ET AL. *v.* CONNORS, TREASURER OF MONTANA, ET AL., 431 U. S. 973;

No. 76–1113. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL., 433 U. S. 916;

No. 76–1116. NEW YORK *v.* EARL, 431 U. S. 943;

No. 76–1209. GENERAL MOTORS CORP. *v.* STEWART ET AL., 433 U. S. 919;

No. 76–1295. FINNEY *v.* UNITED STATES, 431 U. S. 905;

No. 76–1367. HYSTER CO. *v.* NATIONAL LABOR RELATIONS BOARD, 431 U. S. 955;

No. 76–1378. WHITESEL *v.* UNITED STATES, 431 U. S. 967;

No. 76–1414. SHAND *v.* NATIONAL LABOR RELATIONS BOARD, 431 U. S. 955;

No. 76–1429. BRADLEY ET AL. *v.* WHITTEN, 431 U. S. 955; and

No. 76–1479. QUALLS *v.* FRESNO COUNTY BOARD OF SUPERVISORS ET AL., 431 U. S. 968. Petitions for rehearing denied.

No. 76–1589. DAWKINS *v.* NABISCO, INC., BAKERY & CONFECTIONERY UNION, LOCAL No. 42, 433 U. S. 910;

No. 76–1618. COSTEY *v.* UNITED STATES, 431 U. S. 968;

No. 76–5306. DOBBERT *v.* FLORIDA, 432 U. S. 282;

No. 76–6221. FUSCO *v.* UNITED STATES, 433 U. S. 909;

No. 76–6723. FALVO *v.* UNITED STATES, 433 U. S. 909;

No. 76–6238. KEENER *v.* GEORGIA, 433 U. S. 911;

No. 76–6322. CAHNMANN *v.* ECKERTY, CITY CLERK OF URBANA, 431 U. S. 934;

No. 76–6333. GHOLSON ET AL. *v.* TEXAS, 432 U. S. 911;

No. 76–6406. PILLA *v.* UNITED STATES, 432 U. S. 907;

No. 76–6407. HARRIS *v.* GEORGIA, 431 U. S. 933;

No. 76–6497. FLOYD *v.* GEORGIA, 431 U. S. 949;

No. 76–6518. KNIGHTEN *v.* BRODERICK, 431 U. S. 941;

No. 76–6527. GUELKER *v.* MISSOURI, 431 U. S. 941;

No. 76–6555. GRIFFIN *v.* TEXAS EMPLOYMENT COMMISSION ET AL., 431 U. S. 942;

No. 76–6569. ALLOTEY *v.* UNITED STATES, 432 U. S. 908;

No. 76–6622. PATTERSON *v.* GEORGIA, 431 U. S. 970;

No. 76–6623. JOHNSTON ET AL. *v.* UNITED STATES, 431 U. S. 942;

No. 76–6642. CROWLEY *v.* NEW JERSEY, 431 U. S. 971;

No. 76–6681. CROWLEY *v.* NEW JERSEY, 432 U. S. 909; and

No. 76–6733. FOSTER *v.* BECHTEL CORP., 432 U. S. 909. Petitions for rehearing denied.

No. 75–1882. CARTER ET AL. *v.* UNITED STATES, 431 U. S. 965. Motion of petitioner Carter for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 76–321. STENCEL AERO ENGINEERING CORP. *v.* UNITED STATES, 431 U. S. 666. Motion of Textron, Inc., et al. for leave to file a brief as *amici curiae* granted. Petition for rehearing denied.

No. 76–710. BOARD OF EDUCATION OF JEFFERSON COUNTY ET AL. *v.* NEWBURG AREA COUNCIL, INC., ET AL., 429 U. S. 1074, and 430 U. S. 941. Motion for leave to file second petition for rehearing denied.

No. 76–960. JOHNSON *v.* INDIANA, 430 U. S. 915; and

No. 76–6323. ELLSWORTH *v.* UNITED STATES, 431 U. S. 931. Motions for leave to file petitions for rehearing denied.

No. 76–1432. STANDARD OIL COMPANY OF CALIFORNIA *v.* FEDERAL TRADE COMMISSION;

No. 76–1434. MOBIL OIL CORP. *v.* FEDERAL TRADE COMMISSION; and

No. 76–1435. TEXACO INC. ET AL. *v.* FEDERAL TRADE COMMISSION, 431 U. S. 974. Petition for rehearing denied. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

OCTOBER 11, 1977

Appeals Dismissed

No. 76–1828. GROSS, DBA VALLEY ROCK & SAND CORP. *v.* COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 76–6962. WITZKOWSKI *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 53 Ill. 2d 216, 290 N. E. 2d 236.

No. 77–5145. ROYAL *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 428 F. Supp. 75.

Vacated and Remanded on Appeal

No. 76–265. MASSACHUSETTS ET AL. *v.* FEENEY. Appeal from D. C. Mass. Motion of John R. Buckley, Secretary of Administration and Finance of Massachusetts, for leave to file a brief as *amicus curiae* granted. Judgment vacated and case remanded for further consideration in light of *Washington* v. *Davis*, 426 U. S. 229 (1976). MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 415 F. Supp. 485.

Certiorari Granted—Vacated and Remanded. (See also No. 76–1418, *ante*, p. 5.)

No. 77–292. UNITED STATES POSTAL SERVICE *v.* ASSOCIATED THIRD CLASS MAIL USERS. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the March 1977 amended provisions of the Board of Governors' internal operating procedures. Reported below: 186 U. S. App. D. C. 331, 569 F. 2d 570.

Miscellaneous Orders

No. A–192 (76–6528). BURKS *v.* UNITED STATES. C. A. 6th Cir. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–69. IN RE DISBARMENT OF LUNDY. Disbarment entered. [For earlier order herein, see 429 U. S. 936.]

No. D–81. IN RE DISBARMENT OF DARROW. Disbarment entered. [For earlier order herein, see 429 U. S. 954.]

No. D–101. IN RE DISBARMENT OF WALKER. Disbarment entered. [For earlier order herein, see 430 U. S. 981.]

No. D–103. IN RE DISBARMENT OF CLAY. Disbarment entered. [For earlier order herein, see 430 U. S. 981.]

No. D–106. IN RE DISBARMENT OF ABBOTT. Disbarment entered. [For earlier order herein, see 431 U. S. 912.]

No. D–109. IN RE DISBARMENT OF SPECKMAN. Disbarment entered. [For earlier order herein, see 431 U. S. 936.]

No. D–115. IN RE DISBARMENT OF MCCARRON. It is ordered that Oliver J. McCarron, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–116. IN RE DISBARMENT OF BUTLER. It is ordered that Richard William Butler, of Glenarm, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–117. IN RE DISBARMENT OF EISENBERG. It is ordered that Robert A. Eisenberg, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–118. IN RE DISBARMENT OF RUTTENBERG. It is ordered that Marshall Jack Ruttenberg, of Wilmette, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 76–558. RAYMOND MOTOR TRANSPORTATION, INC., ET AL. *v.* RICE, SECRETARY, DEPARTMENT OF TRANSPORTATION OF WISCONSIN, ET AL. Appeal from D. C. W. D. Wis. [Probable jurisdiction noted, 430 U. S. 914.] Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 76–678. SHELL OIL CO. *v.* DARTT. C. A. 10th Cir. [Certiorari granted, 429 U. S. 1089.] Motion of the Solicitor General for leave to file a brief as *amicus curiae* denied.

No. 76–682. SANTA CLARA PUEBLO ET AL. *v.* MARTINEZ ET AL. C. A. 10th Cir. [Certiorari granted, 431 U. S. 913.] Motion of Pueblo De Cochiti et al. for leave to file a brief as *amici curiae* granted.

No. 76–695. BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. *v.* HOROWITZ. C. A. 8th Cir. [Certiorari granted, 430 U. S. 964.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 76–749. PFIZER INC. ET AL. *v.* GOVERNMENT OF INDIA ET AL. C. A. 8th Cir. [Certiorari granted, 430 U. S. 964.] Motion of Federal Republic of Germany for leave to file a brief as *amicus curiae* granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 76–811. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* BAKKE. Sup. Ct. Cal. [Certiorari granted, 429 U. S. 1090.] Motions of Polish American Congress et al. and Committee on Academic Nondiscrimination and Integrity et al. for leave to participate in oral argument as *amici curiae* denied.

No. 76–839. FOLEY *v.* CONNELIE, SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 430 U. S. 944.] Motion of Mexican-American Legal Defense & Educational Fund et al. for leave to file a brief as *amici curiae* granted.

No. 76–930. RAY, GOVERNOR OF WASHINGTON, ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL. Appeal from D. C. W. D. Wash. [Probable jurisdiction noted, 430 U. S. 905.] Motions of Mid-America Legal Foundation and Maritime Law Association of the United States for leave to file briefs as *amici curiae* granted.

No. 76–1114. CALIFORNIA ET AL. *v.* SOUTHLAND ROYALTY CO. ET AL.;

No. 76–1133. EL PASO NATURAL GAS CO. *v.* SOUTHLAND ROYALTY CO. ET AL.; and

No. 76–1587. FEDERAL POWER COMMISSION *v.* SOUTHLAND ROYALTY CO. ET AL. C. A. 5th Cir. [Certiorari granted, 433 U. S. 907.] Motions of Associated Gas Distributors and Public Service Commission of New York for leave to file briefs as *amici curiae* granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 76–1359. BANKERS TRUST CO. *v.* MALLIS ET AL. C. A. 2d Cir. [Certiorari granted, 431 U. S. 928.] Motion of New York Clearing House Assn. for leave to file a brief as *amicus curiae* granted.

No. 76–1427. MCDANIEL *v.* PATY ET AL. Sup. Ct. Tenn. [Probable jurisdiction noted, 432 U. S. 905.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 76–1450. LANDMARK COMMUNICATIONS, INC. *v.* VIRGINIA. Appeal from Sup. Ct. Va. [Probable jurisdiction noted, 431 U. S. 964.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 76–6372. QUILLOIN *v.* WALCOTT ET VIR. Appeal from Sup. Ct. Ga. [Probable jurisdiction noted, 431 U. S. 937.] Motion of appellees to permit Thomas F. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 76–6513. BELL *v.* OHIO. Sup. Ct. Ohio. [Certiorari granted, 433 U. S. 907.] Motion of American Civil Liberties Union of Ohio Foundation, Inc., for leave to file a brief as *amicus curiae* granted.

No. 76–6617. GREENE *v.* MASSEY, CORRECTIONAL SUPERINTENDENT. C. A. 5th Cir. [Certiorari granted, 432 U. S. 905.] Motion of Donald C. Peters, Esquire, to permit John T. Chandler, Esquire, to argue *pro hac vice*, on behalf of petitioner granted. Motion of Basil S. Diamond, Esquire, to permit Harry M. Hipler, Esquire, to argue *pro hac vice* on behalf of respondent granted.

No. 77–5278. MALDONADO *v.* ESTELLE, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of certiorari denied.

No. 76–6924. TALK *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT;

No. 77–165. MCMILLEN *v.* LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK; and

No. 77–5262. HINES *v.* SNEED, U. S. CIRCUIT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 76–1621. MCCLELLAN ET AL. *v.* MCSURELY ET UX. C. A. D. C. Cir. Certiorari granted. Reported below: 180 U. S. App. D. C. 101, 553 F. 2d 1277.

No. 77–117. NATIONAL BROILER MARKETING ASSN. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 550 F. 2d 1380.

No. 77–154. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND *v.* MORENO ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 556 F. 2d 573.

No. 76–6767. SCOTT ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted limited to Question 1 presented by the petition. Parties also directed to brief and argue question of standing. Reported below: 179 U. S. App. D. C. 281, 551 F. 2d 467.

No. 76–1382. UNITED STATES *v.* SCOTT. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 544 F. 2d 903.

No. 76–6942. LAKESIDE *v.* OREGON. Sup. Ct. Ore. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 277 Ore. 569, 561 P. 2d 612.

No. 76–6997. LOCKETT *v.* OHIO. Sup. Ct. Ohio. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 49 Ohio St. 2d 48, 358 N. E. 2d 1062.

No. 77–5176. FRANKS *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 373 A. 2d 578.

Certiorari Denied. (See also No. 77–5145, *supra.*)

No. 76–1653. AMERICAN INSTITUTE FOR SHIPPERS' ASSNS., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 127, 549 F. 2d 829.

No. 76–1661. J. L. SIMMONS CO., INC., ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 768.

No. 76–1710. TEXAS *v.* UNITED STATES STEEL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 626.

No. 76–1723. HEISE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 76–1727. MALLEY, WARDEN *v.* JAMES. C. A. 10th Cir. Certiorari denied. Reported below: 553 F. 2d 59.

No. 76–1768. TALLANT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 1291.

No. 76–6850. CRESPO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 76–6873. MCDERMOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 575.

No. 76–6946. BUCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 871.

No. 76–6959. HAYES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6973. IN RE BARTLETT. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 580.

No. 76–6979. VAN BUREN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 76–6988. HAIMSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 561.

No. 77–7. DEAL, EXECUTRIX, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 255.

No. 77–17. SMALDONE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–43. MELVIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 77–99. UTAH STATE UNIVERSITY OF AGRICULTURE AND APPLIED SCIENCE *v.* BEAR, STEARNS & CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 549 F. 2d 164.

No. 77–103. LEO FOUNDATION *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 117 N. H. 209, 372 A. 2d 1311.

No. 77–127. WALKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–138. WEINBERGER *v.* DEPARTMENT OF COMMERCE OF FLORIDA; WEINBERGER *v.* TROMBETTA ET AL.; and WEINBERGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1284 (first and second cases); 555 F. 2d 1390 (third case).

No. 77–150. CONLEY *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 77–196. GENERAL FINANCE CORP. *v.* POLLOCK ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 1142.

No. 77–208. AMALGAMATED TRANSIT UNION, LOCAL 788 *v.* ALLEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 554 F. 2d 876.

No. 77–212. ROGERS *v.* CHILIVIS, COMMISSIONER OF REVENUE OF GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 141 Ga. App. 407, 233 S. E. 2d 451.

No. 77–213. BANDELIN *v.* PIETSCH ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 98 Idaho 337, 563 P. 2d 395.

No. 77–230. MEDINA *v.* RUDMAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 545 F. 2d 244.

No. 77–245. NORTH SHORE TRAVEL SERVICE, INC. *v.* HINTERSEHR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 558.

No. 77–247. FOLEY *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 77–253. DECARLO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 244 Pa. Super. 608, 371 A. 2d 1296.

No. 77–261. FRANCIS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 345 So. 2d 1120.

No. 77–268. FLOTA MERCANTE GRANCOLOMBIANA, S. A. *v.* VANA TRADING CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 100.

No. 77–273. COLODNY ET AL. *v.* KRAUSE. Ct. App. Ga. Certiorari denied. Reported below: 141 Ga. App. 134, 232 S. E. 2d 597.

No. 77–276. TUNNEL BARREL & DRUM CO. ET AL. *v.* HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION ET AL. Super. Ct. N. J. Certiorari denied.

No. 77–297. KERSHMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 555 F. 2d 198.

No. 77–298. JAMES *v.* WILMINGTON NEWS JOURNAL CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 410, 559 F. 2d 187.

No. 77–302. RIZZO, MAYOR OF PHILADELPHIA, ET AL. *v.* ROSENTHAL. C. A. 3d Cir. Certiorari denied. Reported below: 555 F. 2d 390.

No. 77–305. BAUER ET AL. *v.* GILLIAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 304.

No. 77–315. VARIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 1330.

No. 77–345. ONE 1974 CADILLAC ELDORADO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 77–349. DENTON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 811.

No. 77–360. ROTONDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 712.

No. 77–364. LIND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 53.

No. 77–5001. HEATH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 343 So. 2d 13.

No. 77–5014. BURGESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 575.

No. 77–5028. RUNNELS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 562 P. 2d 932.

No. 77–5084. WARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1210.

No. 77–5092. BRANDON *v.* UNITED STATES; and
No. 77–5105. WILLIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 77–5092, 559 F. 2d 1209; No. 77–5105, 559 F. 2d 1210.

No. 77–5138. REYNOLDS *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–5168. LYONS *v.* CULLINANE, CHIEF OF POLICE OF D. C., ET AL. Ct. App. D. C. Certiorari denied.

No. 77–5191. BOYD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5192. BENNETT *v.* DIRECTOR OF INTERNAL REVENUE FOR NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 304.

No. 77–5219. SHIELDS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 374 A. 2d 816.

No. 77–5223. CONLEY *v.* ENGLE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1219.

No. 77–5226. HIGHTOWER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 77–5239. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 349 So. 2d 638.

No. 77–5234. GILES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 261 Ark. 413, 549 S. W. 2d 479.

No. 77–5241. CLAYTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5247. JONES *v.* PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 77–5260. FELTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 346 So. 2d 205.

No. 77–5277. WETHERINGTON *v.* PUTNAM, MAGISTRATE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 576.

No. 77–5284. KING *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 66 Ill. 2d 551, 363 N. E. 2d 838.

No. 77–5292. ATCHISON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 268 S. C. 588, 235 S. E. 2d 294.

No. 77–5298. SEVERA *v.* UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 27 Pa. Commw. 67, 365 A. 2d 1325.

No. 77–5320. FRIEDBERG *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. C. A. 7th Cir. Certiorari denied.

No. 77–5374. GREEDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 822.

No. 77–5385. SOR-LOKKEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 557 F. 2d 755.

No. 77–5400. JENKINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 374 A. 2d 581.

No. 77–5421. KROHN ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 293.

No. 76–1827. HAIM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 554 F. 2d 474.

No. 76–6743. CULP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1035.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

After a jury trial in 1972 in the United States District Court for the District of Nebraska, petitioner was convicted of forcibly breaking into a post office with intent to commit larceny. The proof at trial showed that postal money orders identified by serial number and a postal marking stamp containing the legend "Lincoln, Nebraska Station No. 5" were missing and taken in the crime of which petitioner was convicted. Previously, petitioner had been indicted in the Southern District of Florida on charges of receiving property stolen from the post office, passing forged postal money orders, and conspiracy to commit those offenses. The Florida indictment listed as overt acts the unlawful receipt, concealment, and retention of postal money orders with serial numbers identical to those involved in the Nebraska case as well as possession of the Lincoln, Neb., postal marking stamp. Guilty pleas were entered to this indictment and petitioner was sentenced to consecutive terms totaling 10 years on October 19, 1971. The convictions in both Nebraska and Florida were upheld on appeal and certiorari was denied.

Thereafter, petitioner moved the Nebraska court pursuant to 28 U. S. C. § 2255 to vacate the Nebraska conviction. In support of this motion it was argued that Congress did not intend to punish a person who steals from a post office for both the act of larceny and the subsequent receipt and posses-

sion of the property stolen. Cf. *Milanovich* v. *United States*, 365 U. S. 551 (1961). In addition, petitioner took the position that the Double Jeopardy Clause required the Nebraska conviction to be set aside. The District Court rejected both contentions and the Court of Appeals affirmed without opinion. 558 F. 2d 1035 (CA8 1977).

I would grant the petition for certiorari and reverse the judgment of the United States Court of Appeals for the Eighth Circuit. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting from denial of certiorari), and cases collected therein.

No. 76–6774. KIRK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 550 F. 2d 1283.

No. 76–6981. BUTLER *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 554.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Petitioner was charged by information in New York State court in Suffolk County with the criminal possession of stolen property. He pleaded guilty and was sentenced to one year in county jail. Thereafter, he was indicted in New York State court in Nassau County and charged with burglary arising out of the same episode. Over his objection that this indictment violated the Double Jeopardy Clause, petitioner was convicted after a jury trial and sentenced to an indetermi-

nate sentence not to exceed five years. The burglary conviction was affirmed on direct appeal by the Appellate Division of the New York Supreme Court, *People* v. *Butler,* 44 App. Div. 2d 423, 355 N. Y. S. 2d 172 (1974), and the New York Court of Appeals, 36 N. Y. 2d 990, 337 N. E. 2d 120 (1975). The Federal District Court subsequently denied petitioner habeas corpus relief, *Butler* v. *Bombard,* No. 76 C 1126 (EDNY Dec. 8, 1976), and the Court of Appeals for the Second Circuit affirmed, 556 F. 2d 554 (1977).

I would grant the petition for certiorari and reverse the judgment of the Second Circuit. Obviously the two New York counties are not separate sovereigns for double jeopardy purposes. See *Waller* v. *Florida,* 397 U. S. 387 (1970). I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma,* 429 U. S. 1053 (1977) (BRENNAN, J., dissenting from denial of certiorari), and cases collected therein.

No. 77–185. ROME ET UX., TRUSTEES *v.* INDIAN HEAD, INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 559 F. 2d 1202.

No. 77–5095. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 553 F. 2d 782.

No. 77–5111. TOWNSEND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE POWELL would grant certiorari. Reported below: 555 F. 2d 152.

OCTOBER 13, 1977

Dismissal Under Rule 60

No. 76–1757. WESSEL *v.* PENNSYLVANIA STATE BOARD OF LAW EXAMINERS. Sup. Ct. Pa. Certiorari dismissed under this Court's Rule 60.

OCTOBER 14, 1977

Miscellaneous Order

No. A–331. MEANS *v.* SOUTH DAKOTA. Application for stay of order of the Supreme Court of South Dakota, dated September 9, 1977, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted, pending receipt of a response from respondent which is to be filed before the close of business October 21, 1977, and until further action of this Court.

OCTOBER 17, 1977

Affirmed on Appeal

No. 76–1349. MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT, ET AL. *v.* BUCKNER ET AL. Appeal from D. C. Conn. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 424 F. Supp. 366.

Appeals Dismissed

No. 76–1519. KUHNLE *v.* O'HAGAN, COMMISSIONER, FIRE DEPARTMENT OF THE CITY OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 40 N. Y. 2d 720, 358 N. E. 2d 507.

No. 76–1813. THOMPSON *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 88 Wash. 2d 13, 558 P. 2d 202.

No. 77–280. PAUL KOCH VOLKSWAGEN, INC. *v.* WISHERD. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 28 Ore. App. 513, 559 P. 2d 1305.

No. 77–295. RAFFERTY ET AL. *v.* MARCIN. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 44 Ill. App. 3d 930, 358 N. E. 2d 1276.

Miscellaneous Orders

No. A–147. OLIVERA ET AL. *v.* SOUTH CAROLINA. C. A. 4th Cir. Application for reduction of bond, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–293 (77–471). MCDOUGAL *v.* COUNTY OF IMPERIAL. Appeal from Sup. Ct. Cal. Application for stay and supersedeas on appeal, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–327. PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL. *v.* BRITISH AIRWAYS BOARD ET AL. C. A. 2d Cir. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–64. IN RE DISBARMENT OF WASSERMAN. Disbarment entered. [For earlier order herein, see 429 U. S. 913.]

No. D–108. IN RE DISBARMENT OF ZEIGLER. Disbarment entered. [For earlier order herein, see 431 U. S. 913.]

No. D–110. IN RE DISBARMENT OF CRUZE. Disbarment entered. [For earlier order herein, see 431 U. S. 936.]

No. D–112. IN RE DISBARMENT OF CAIN. Disbarment entered. [For earlier order herein, see 431 U. S. 962.]

No. D–113. IN RE DISBARMENT OF LIBRACH. Disbarment entered. [For earlier order herein, see 433 U. S. 906.]

No. D–114. IN RE DISBARMENT OF CONSOLDANE. It is ordered that Anthony V. Consoldane, of Warren, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–119. In re Disbarment of Sugar. It is ordered that Manuel Jerome Sugar, of Olympia Fields, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–120. In re Disbarment of Boznos. It is ordered that Peter William Boznos, of Pompano Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 77–5174. Murry *v.* United States. C. A. 6th Cir. Motion of petitioner to consolidate with Nos. 76–5761 and 76–5796, *Simpson* v. *United States* [certiorari granted, 430 U. S. 964], for oral argument denied.

No. 75–1771. Commissioner of Internal Revenue *v.* Standard Life & Accident Insurance Co., 433 U. S. 148. Motion to retax costs granted. Mr. Justice Stewart took no part in the consideration or decision of this motion.

No. 76–811. Regents of the University of California *v.* Bakke. Sup. Ct. Cal. [Certiorari granted, 429 U. S. 1090.] Motion of Members of the Congressional Black Caucus et al. for leave to file a brief as *amici curiae* denied. Each party to this cause is directed to file within 30 days a supplemental brief discussing Title VI of the Civil Rights Act of 1964 as it applies to this case.

No. 76–1143. Marshall, Secretary of Labor, et al. *v.* Barlow's, Inc. Appeal from D. C. Idaho. [Probable jurisdiction noted, 430 U. S. 964.] Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 76–1159. QUERN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* MANDLEY ET AL.; and

No. 76–1416. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MANDLEY ET AL. C. A. 7th Cir. [Certiorari granted, 431 U. S. 953.] Motion of United Way of Metropolitan Chicago et al. for leave to file a brief as *amici curiae* granted. Joint motion of petitioners for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 77–318. SHANG, ACTING COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* HOLLEY ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–373. ERNEST *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT; and

No. 77–5349. CARTER *v.* BUE, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 76–1410. AGOSTO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. Reported below: 549 F. 2d 806.

No. 76–1607. SECURITIES AND EXCHANGE COMMISSION *v.* SLOAN. C. A. 2d Cir. Certiorari granted. In addition to questions presented by the petition the parties are requested to brief and argue question of possibility of mootness. Reported below: 547 F. 2d 152.

No. 76–1660. HUTTO ET AL. *v.* FINNEY ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 548 F. 2d 740.

No. 77–5353. MINCEY *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 115 Ariz. 472, 566 P. 2d 273.

Certiorari Denied

No. 76–1440. GOLDSTEIN *v.* UNITED STATES;

No. 76–6561. NIKOLORIC *v.* UNITED STATES; and

No. 76–6579. DEARDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 622.

No. 76–1718. BEAME, MAYOR OF NEW YORK CITY, ET AL. *v.* FRIENDS OF THE EARTH ET AL.; and

No. 76–1737. CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* FRIENDS OF THE EARTH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 2d 25.

No. 76–1719. WASHINGTON MEDICAL CENTER, INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 211 Ct. Cl. 145, 545 F. 2d 116.

No. 76–1783. LEDEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 990.

No. 76–6744. TILLOTSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–6768. WOODS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 269.

No. 76–6779. NIEHAUS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 265 Ind. 655, 359 N. E. 2d 513.

No. 76–6806. OLSON *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 76–6875. HIMMELWRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 991.

No. 76–6941. GAMBLE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 654.

No. 77–34. PARTIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 621.

No. 77–67. ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–93. MASONIC HOME OF DELAWARE, INC. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–106. TRUDO *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 253 N. W. 101.

No. 77–115. WESTERN UNION TELEGRAPH CO. *v.* WESTERN UNION INTERNATIONAL, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 544 F. 2d 87.

No. 77–134. REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSNS., INC. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 182 U. S. App. D. C. 177, 559 F. 2d 798.

No. 77–163. ALABAMA DRY DOCK & SHIPBUILDING CO. *v.* KININESS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 176.

No. 77–183. ASPHALT MATERIALS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1205.

No. 77–218. EXPERT ELECTRIC, INC., ET AL. *v.* LEVINE, INDUSTRIAL COMMISSIONER OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 554 F. 2d 1227.

No. 77–220. FAIRFAX AUTO PARTS, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 548 F. 2d 501.

No. 77–228. KEYES *v.* LENOIR RHYNE COLLEGE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 552 F. 2d 579.

No. 77–260. NAEGELE ET AL., TRUSTEES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1036.

No. 77–299. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* BRANDT ELEVATOR, INC., ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 254 N. W. 2d 6.

No. 77–304. RICHTER, DBA BODY SHOP *v.* RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–323. ANDERSON ET UX. *v.* CITY OF DEKALB ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 43 Ill. App. 3d 915, 357 N. E. 2d 837.

No. 77–325. NASHVILLE GAS CO. *v.* TENNESSEE PUBLIC SERVICE COMMISSION ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 551 S. W. 2d 315.

No. 77–330. COLUMBIA RESEARCH CORP. ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 71 Cal. App. 3d 607, 139 Cal. Rptr. 517.

No. 77–347. NOLAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 2d 266.

No. 77–355. BERNSTEIN *v.* FLORIDA; and BROPHY *v.* NEW HAMPSHIRE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 37.

No. 77–412. COMPTON ET AL. *v.* McCOOK COUNTY NATIONAL BANK. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 871.

No. 77–5016. ROBINSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 200, 556 F. 2d 77.

No. 77–5066. MORGAN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 550 S. W. 2d 643.

No. 77–5081. CHIOLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1224.

No. 77–5090. RANDOLPH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1033.

No. 77–5177. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1034.

No. 77–5183. PITTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1220.

No. 77–5184. PRATHER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–5188. GROFT *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 77–5189. ANDERSON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1067.

No. 77–5194. MACHADO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 741, 391 N. Y. S. 2d 936.

No. 77–5224. JARAMILLO *v.* TENORIO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 554 F. 2d 423.

No. 77–5229. LUNSFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 1030.

No. 77–5244. HART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 2d 162.

No. 77–5303. WRIGHT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 244 Pa. Super. 619, 371 A. 2d 1302.

No. 77–5309. CAMPBELL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 77–5326. CRADDOCK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 553 S. W. 2d 765.

No. 77–5330. COLLINS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 561 P. 2d 1373.

No. 77–5331. HOLMQUIST *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 173 Conn. 140, 376 A. 2d 1111.

No. 77–5344. HUNTER ET UX. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 360 N. E. 2d 588.

No. 77–5345. PATNO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 2d 967, 390 N. Y. S. 2d 471.

No. 77–5346. O'CONNOR *v.* O'CONNOR. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–5350. COCHRAN *v.* BAYER. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1219.

No. 77–5351. ARCENEAUX *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 77–5352. PULLEY *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 77–5354. PIERCE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 34 Md. App. 654, 369 A. 2d 140.

No. 77–5359. HOLMES *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 77–5370. CARR *v.* GRACE ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 348 So. 2d 966.

No. 77–5402. HALL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1114.

No. 77–5415. BOOTH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1063.

No. 77–5440. SMITH *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–5443. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 559 F. 2d 561.

No. 76–1625. MAYES ET AL. *v.* STATON. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 552 F. 2d 908.

No. 76–1638. MASRI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 932.

MR. JUSTICE WHITE, with whom MR. JUSTICE MARSHALL joins, dissenting.

I dissent from the denial of the petition for certiorari.

The issue is the admissibility of polygraph evidence offered in his own defense by a defendant in a criminal trial. The facts about his conduct were largely undisputed; his principal defense was that he lacked criminal intent. The trial judge found that the polygraph evidence proffered could have been appropriate on the question of intent but excluded the

evidence because of the rule in the Fifth Circuit absolutely barring polygraph evidence.

The rule is different in other Circuits. Some have expressed a willingness to uphold a trial judge's sound discretion on admitting polygraph evidence. See, *e. g.*, *United States* v. *Mayes*, 512 F. 2d 637 (CA6), cert. denied, 422 U. S. 1008 (1975); *United States* v. *Infelice*, 506 F. 2d 1358 (CA7 1974), cert. denied, 419 U. S. 1107 (1975); *United States* v. *De Betham*, 470 F. 2d 1367 (CA9 1972), cert. denied, 412 U. S. 907 (1973); and *United States* v. *Wainwright*, 413 F. 2d 796 (CA10 1969), cert. denied, 396 U. S. 1009 (1970). See also *United States* v. *Ridling*, 350 F. Supp. 90 (ED Mich. 1972). Nor is polygraph evidence inherently inadmissible in the Eighth Circuit. There the trial judge may admit such evidence offered by the defense without an objection by the Government. Compare *United States* v. *Oliver*, 525 F. 2d 731 (CA8 1975), with *United States* v. *Alexander*, 526 F. 2d 161, 170 n. 18 (CA8 1975).

This Court should grant certiorari in such cases as this, where a defendant's rights would be notably different depending upon the Circuit in which he is tried, and where the record affords a clear opportunity to address the question in conflict. I therefore dissent and would set the case for oral argument.

No. 76–1838. PAUL *v.* PLEASANTS, SHERIFF. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 551 F. 2d 575.

No. 76–6261. RANSOM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 481.

MR. JUSTICE WHITE, dissenting.

This case raises the question whether 18 U. S. C. § 922 (a) (6), which prohibits the purchaser of a firearm from making a

false statement material to the lawfulness of the sale, requires the purchaser to disclose a prior felony conviction obtained in violation of his Sixth Amendment right to counsel. Petitioner contends that a conviction obtained without the counsel guaranteed by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), is "void" under *Burgett* v. *Texas*, 389 U. S. 109 (1967), and therefore cannot be used to convict a person who has represented that he has no prior felony convictions. Some courts have accepted this theory, *United States* v. *O'Neal*, 545 F. 2d 85 (CA9 1976); *United States* v. *Pricepaul*, 540 F. 2d 417 (CA9 1976), or have held that a conviction invalid for denial of the right to counsel is not material to enforcement of the federal firearms statutes, *United States* v. *Megura*, 394 F. Supp. 246 (Conn. 1975); see *United States* v. *Cody*, 529 F. 2d 564, 567 n. 4 (CA8 1976) (dictum). Other courts, including the Fifth Circuit panel below, have held that even where a prior conviction is invalid for failure to furnish counsel, a purchaser of firearms who falsely represents that he has no prior convictions may be punished under § 922 (a)(6). *United States* v. *Allen*, 556 F. 2d 720 (CA4 1977); *United States* v. *Graves*, 554 F. 2d 65 (CA3 1977); *United States* v. *Ransom*, 545 F. 2d 481 (CA5 1977); *United States* v. *Cassity*, 521 F. 2d 1320 (CA6 1975).

While I recognize that this Court cannot decide every question of federal law presented to it, there is an urgent need to resolve conflicts such as this one. American citizens have a right to know the precise requirements of the criminal code with which they are expected to comply. The national criminal code should not be differently interpreted in different courts; some individuals should not be punished for conduct for which others would go free. Because the task of resolving such conflicts in interpreting the federal law is not here being fulfilled, I dissent from the denial of certiorari in this case.

No. 76–6612. SCOTT *v.* WILLIAMS ET AL.; and

No. 76–6858. LAY *v.* WILLIAMS ET AL. Ct. Crim. App. Okla. Certiorari denied.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

These two cases raise once again the question of whether parole release determinations implicate an interest in liberty entitled to protection under the Due Process Clause of the Fourteenth Amendment. Petitioners in both cases contend that the Oklahoma Pardon and Parole Board acted unconstitutionally in denying them parole without affording them an opportunity to appear personally before the Board and providing them with reasons for its decision. The Oklahoma Court of Criminal Appeals denied relief. The issue is clearly an important one which significantly affects a great number of persons. Indeed, we have previously granted certiorari to decide whether due process requires that parole release hearings be accompanied by procedural safeguards. See *Scott* v. *Kentucky Parole Board*, 423 U. S. 1031 (1975); 429 U. S. 60 (1976) (vacating and remanding case below for consideration of mootness). The question has been extensively litigated in federal and state appellate courts with varying and conflicting results. The confusing state of the law is evident from the cases cited in *Scott* v. *Kentucky Parole Board*, 429 U. S., at 61 n. 1 (STEVENS, J., dissenting). Under these circumstances, the Court's refusal to grant certiorari in these two cases is inexplicable if judged by normal standards governing the exercise of our certiorari jurisdiction. I would set the cases for oral argument.

No. 76–6916. SCHUSTER *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

MR. JUSTICE BRENNAN, dissenting.

This suit is brought by a New York citizen against New York officials. In that circumstance it is my view that New

York may not invoke the Eleventh Amendment, since that Amendment in terms bars only federal court suits against States by citizens of other States. *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (BRENNAN, J., dissenting). I would grant the petition and reverse the judgment of the Court of Appeals.

No. 77–119. RUSKAY ET AL. *v.* WADDELL ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 552 F. 2d 392.

No. 77–128. DUPUY *v.* DUPUY. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 1005.

MR. JUSTICE WHITE, dissenting.

This case concerns the standard of care required of plaintiffs seeking to recover damages for violations of § 10 (b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5. In the wake of this Court's decision in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), the Courts of Appeals have reached differing conclusions as to the degree of diligence appropriately required. The court below held that because *Ernst & Ernst* had imposed on defendants a standard not stricter than nonrecklessness, a plaintiff would not be barred from recovery unless he had been reckless. 551 F. 2d 1005. Similarly, the Tenth and Seventh Circuits have held that, after *Ernst & Ernst*, the contributory fault of the plaintiff would bar recovery only if it constituted "gross conduct somewhat comparable to that of defendant." *Holdsworth* v. *Strong*, 545 F. 2d 687, 693 (CA10 1976), cert. denied, 430 U. S. 955 (1977); *Sundstrand Corp.* v. *Sun Chemical Corp.*, 553 F. 2d 1033, 1048 (CA7), cert. denied, *ante*, p. 875. Also, the Third Circuit now "require[s] only that the plaintiff act reasonably" and has shifted to the defendant the burden of proving the plaintiff's

unreasonable conduct. *Straub* v. *Vaisman & Co.*, 540 F. 2d 591, 598 (1976). The Second Circuit, however, appears to adhere to the view that the plaintiff must demonstrate due diligence in discovering important information. *Hirsch* v. *Du Pont*, 553 F. 2d 750, 762–763 (1977); accord, *NBI Mortgage Investment Corp.* v. *Chemical Bank*, 75 Civ. 3411 (SDNY May 24, 1977) ("the standard of due diligence is still viable and accepted in this circuit").

The Court should take this opportunity to clarify the standard of care expected of plaintiffs in litigation under Rule 10b–5. Business can be transacted more freely and efficiently if the responsibility for verifying underlying facts is clearly allocated. Because securities litigation can be complex and expensive, it shoud be avoided to the maximum extent by early clarification of the ground rules. This Court should thus promptly resolve the existing uncertainty as to the proper standard of care required of plaintiffs after *Ernst & Ernst*. Accordingly, I dissent from the denial of certiorari in this case.

No. 77–348. TRACY *v.* GOLSTON ET AL. Certiorari before judgment to C. A. 9th Cir. and other relief denied.

No. 77–5257. RUST *v.* NEBRASKA; and HOLTAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 197 Neb. 528, 250 N. W. 2d 867 (first case); 197 Neb. 544, 250 N. W. 2d 876 (second case).

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

October 20, 1977

Miscellaneous Order

No. A–278 (77–452). Mobil Alaska Pipeline Co. *v.* United States et al.;

No. A–280 (77–457). Exxon Pipeline Co. *v.* United States et al.; and

No. A–319 (77–551). BP Pipelines, Inc. *v.* United States et al. C. A. 5th Cir. The applications for stay, presented to Mr. Justice Powell, and by him referred to the Court, are granted. The order of the Interstate Commerce Commission, served June 28, 1977, in its Investigation and Suspension Docket No. 9164, Trans Alaska Pipeline System (Rate Filings), is hereby stayed pending final disposition of the petitions for certiorari by this Court. The stays are conditioned upon applicants-petitioners' agreement to keep account of the amounts collected under the proposed rates, as that term is used in the order in this matter issued by the Interstate Commerce Commission on June 28, 1977, and their agreement to refund any portion of the amounts collected under such rates by virtue of the stay which it is ultimately determined that they were not lawfully entitled to collect. The parties shall submit a proposed order embodying this undertaking to the Clerk of this Court within five days.

Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of this order.

October 31, 1977

Dismissal Under Rule 60.

No. 77–259. Lee Pharmaceuticals *v.* United States District Court for the Central District of California (Den-Mat, Inc., et al., Real Parties in Interest). C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60.

Affirmed on Appeal

No. 76–1855. SPENCER PRESS, INC. *v.* KURTZ, COMMISSIONER OF INTERNAL REVENUE. Affirmed on appeal from D. C. Mass. MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

No. 76–6870. SCHNEIDER ET AL. *v.* MCNUTT, DIRECTOR, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL. Affirmed on appeal from D. C. W. D. Wash.

Appeals Dismissed

No. 76–1809. SCOTT *v.* BENN ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 77–395. BULLION *v.* CITY OF PHILADELPHIA. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. Reported below: 28 Pa. Commw. 485, 368 A. 2d 1375.

No. 77–5009. HALL *v.* HALL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question.

No. 77–5055. D. *v.* JUVENILE DEPARTMENT OF MULTNOMAH COUNTY. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 27 Ore. App. 861, 557 P. 2d 687.

No. 77–18. OSCEOLA *v.* KUYKENDALL ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction. MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concur. See *MTM, Inc.* v. *Baxley*, 420 U. S. 799 (1975), and *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90 (1974). THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE STEVENS would affirm the judgment.

No. 77–359. FLR Corp. *v.* Blodgett, Trustee, et al. Appeal from Ct. Civ. App. Tex., 8th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 541 S. W. 2d 209.

Vacated and Remanded on Appeal

No. 76–1834. Klein, Director, Department of Health and Welfare of Idaho, et al. *v.* Doe et al. Appeal from D. C. Idaho. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Beal* v. *Doe*, 432 U. S. 438 (1977), and *Maher* v. *Roe*, 432 U. S. 464 (1977).

Mr. Justice Blackmun, with whom Mr. Justice Brennan and Mr. Justice Marshall join.

The opinion and judgment of the three-judge District Court in this case were both filed prior to this Court's pronouncements on June 20, 1977, in *Beal* v. *Doe*, 432 U. S. 438, and *Maher* v. *Roe*, 432 U. S. 464, and so the District Court did not have the benefit of those decisions. Being bound by *Beal* and *Maher*, although not at all persuaded or agreeing with them, I am compelled to go along with the Court's order today in the present case.

Inasmuch, however, as the Idaho statute under challenge, 1976 Idaho Sess. Laws, ch. 339, § 3, denies the use of funds for an abortion "unless it is the recommendation of two (2) consulting physicians that an abortion is necessary to save the life or health of the mother . . . ," it seems to me that what this Court said and held in *Doe* v. *Bolton*, 410 U. S. 179, 198–200 (1973), about this type of statutory provision is most pertinent. I therefore trust that the District Court, on remand, will examine the Idaho statute in the light of this particular aspect of *Doe* v. *Bolton*.

I note also that the challenged 1976 Idaho statute was an appropriation Act applicable only to the fiscal year ended June 30, 1977. The appellees' Motion to Dismiss and/or

Affirm in Part asserts, at 4, that the statute "expired by law on June 30, 1977, but was immediately replaced by a permanent codified change to Idaho law (Idaho Code § 56–209c) enacted by the 1977 Idaho Legislature." The new statute is 1977 Idaho Sess. Laws, ch. 321. What effect, if any, all this may have upon the continued vitality of this litigation is something the District Court may also wish to consider on remand.

No. 77–69. PANORA, REGISTRAR OF MOTOR VEHICLES OF MASSACHUSETTS *v.* MONTRYM. Appeal from D. C. Mass. Judgment vacated and case remanded for further consideration in light of *Dixon* v. *Love*, 431 U. S. 105 (1977).* Reported below: 429 F. Supp. 393.

Certiorari Granted—Reversed and Remanded. (See No. 76–1640, *ante*, p. 12.)

Certiorari Granted—Vacated and Remanded

No. 77–336. DELTA AIR LINES, INC. *v.* MCBRIDE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395 (1977). Reported below: 551 F. 2d 113.

Miscellaneous Orders

No. A–331. MEANS *v.* SOUTH DAKOTA. Order heretofore entered on October 14, 1977 [*ante*, p. 898], vacated and application for stay of order of the Supreme Court of South Dakota, dated September 9, 1977, denied. MR. JUSTICE BLACKMUN, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, being concerned about First Amendment implications of the vacation of the stay, dissents and would continue stay pending plenary consideration of South Dakota Supreme Court's revocation of applicant's bail.

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*[REPORTER'S NOTE: This order was vacated and the appeal was restored to the docket, *post*, p. 1058.]

No. D–45. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order, see 420 U. S. 1001.]

No. D–48. IN RE DISBARMENT OF EHRLICHMAN. Disbarment entered. [For earlier order, see 421 U. S. 905.]

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. Motion for leave to file bill of complaint granted and defendant shall have 60 days to answer.

No. 75–1870. E. I. DU PONT DE NEMOURS & Co. *v.* COLLINS ET AL.; and
No. 75–1872. SECURITIES AND EXCHANGE COMMISSION *v.* COLLINS ET AL., 432 U. S. 46. Motion to retax costs denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 76–749. PFIZER INC. ET AL. *v.* GOVERNMENT OF INDIA ET AL. C. A. 8th Cir. [Certiorari granted, 430 U. S. 964.] Motion of Federal Republic of Germany for leave to participate in oral argument as *amicus curiae* denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 76–938. FEDERAL MARITIME COMMISSION ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. D. C. Cir. [Certiorari granted, 430 U. S. 905.] Motion of respondents for divided argument granted.

No. 76–944. NIXON *v.* WARNER COMMUNICATIONS, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 430 U. S. 944.] Motion of respondents for divided argument granted.

No. 76–1168. ARIZONA ET AL. *v.* WASHINGTON. C. A. 9th Cir. [Certiorari granted, 430 U. S. 965.] Motion of respondent for appointment of counsel granted, and it is ordered that Ed Bolding, Esquire, of Tucson, Ariz., be appointed to serve as counsel for respondent in this case.

No. 76–1114. CALIFORNIA ET AL. *v.* SOUTHLAND ROYALTY CO. ET AL.;

No. 76–1133. EL PASO NATURAL GAS CO. *v.* SOUTHLAND ROYALTY CO. ET AL.; and

No. 76–1587. FEDERAL POWER COMMISSION *v.* SOUTHLAND ROYALTY CO. ET AL. C. A. 5th Cir. [Certiorari granted, 433 U. S. 907.] Motion of Federal Power Commission for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 76–1310. HOUCHINS, SHERIFF *v.* KQED, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 431 U. S. 928.] Motion of Reporters Committee for Freedom of the Press Legal Defense & Research Fund et al. for leave to file a brief as *amici curiae* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 76–1596. UNITED STATES *v.* MAURO ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 816.] Motion of respondent Mauro for leave to proceed further herein *in forma pauperis* granted.

No. 76–1800. UNITED STATES *v.* SOTELO ET UX. C. A. 7th Cir. [Certiorari granted, *ante*, p. 816.] Motion of petitioner for leave to dispense with printing appendix granted.

No. 76–6942. LAKESIDE *v.* OREGON. Sup. Ct. Ore. [Certiorari granted, *ante*, p. 889.] Motion of petitioner for appointment of counsel granted, and it is ordered that Phillip M. Margolin, Esquire, of Portland, Ore., be appointed to serve as counsel for petitioner in this case.

No. 77–5521. JONES *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 77–216. TOMKO *v.* TEITELBAUM, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 77–324. HICKLIN ET AL. *v.* ORBECK, COMMISSIONER, DEPARTMENT OF LABOR OF ALASKA, ET AL. Appeal from Sup. Ct. Alaska. Probable jurisdiction noted. Reported below: 565 P. 2d 159.

Certiorari Granted

No. 77–39. PINKUS, DBA ROSSLYN NEWS CO., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 551 F. 2d 1155.

No. 77–240. ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. *v.* BARRY ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 555 F. 2d 3.

No. 77–335. OPPENHEIMER FUND, INC., ET AL. *v.* SANDERS ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 558 F. 2d 636.

Certiorari Denied. (See also No. 77–359, *supra.*)

No. 76–1789. RUCKER *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 552 F. 2d 998.

No. 76–1822. MADONNA *v.* UNITED STATES; and
No. 76–1859. LARCA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 562.

No. 76–6801. HOOVER *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 76–6830. LAW *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 342 So. 2d 412.

No. 76–6961. DUDLEY *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 76–6987. SMITH *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied. Reported below: 89 Misc. 2d 789, 392 N. Y. S. 2d 968.

No. 76–6989. HUCKABY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 343 So. 2d 29.

No. 77–30. STICH *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1070.

No. 77–74. COFER ET AL. *v.* DANN, COMMISSIONER OF PATENTS AND TRADEMARKS. C. C. P. A. Certiorari denied. Reported below: 558 F. 2d 1040.

No. 77–94. M & H PRODUCE CO., INC. *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 128, 549 F. 2d 830.

No. 77–146. NEKOOSA PAPERS, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 841.

No. 77–162. WEITZEL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 314.

No. 77–176. MINERAL VENTURES, LTD. *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1069.

No. 77–182. HART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 551 F. 2d 738.

No. 77–187. KALLIR, PHILIPS, ROSS, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1203.

No. 77–190. AGUILAR ET AL. *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 199, 556 F. 2d 76.

No. 77–193. ADCOCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 397.

No. 77–194. VESPE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1210.

No. 77–200. KAYE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 556 F. 2d 855.

No. 77–215. NEW YORK *v.* ABRUZZI. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 813, 364 N. E. 2d 1342.

No. 77–221. PHILLIPS PETROLEUM CO. *v.* ASHLAND OIL, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 554 F. 2d 381.

No. 77–222. CHRISTOVAO, DBA MERCANTUM TRADING CO. *v.* UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S. C. R. L., ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 2d 561, 390 N. Y. S. 2d 71.

No. 77–225. MANDEL ET AL. *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 281, 551 F. 2d 467.

No. 77–229. PACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1222.

No. 77–264. BROWN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 372 A. 2d 557.

No. 77–265. HIGGINBOTTOM *v.* BLUMENTHAL, SECRETARY OF THE TREASURY. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 99.

No. 77–272. PUGET SOUND TRUCK LINES, INC. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 959.

No. 77–274. TIMBERLAND PACKING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 500.

No. 77–283. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL NO. 13 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1346.

No. 77–284. SHEIKOWITZ *v.* BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 57 App. Div. 2d 1031, 395 N. Y. S. 2d 260.

No. 77–286. UNITED STATES *v.* MCGARRY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 587.

No. 77–327. SHOTT *v.* STARTZMAN, CLERK, SUPREME COURT OF OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 77–328. TRAFFICANTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 605.

No. 77–331. MILLS *v.* ELECTRIC AUTO-LITE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 1239.

No. 77–339. REED, ADMINISTRATRIX, ET AL. *v.* WISER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 555 F. 2d 1079.

No. 77–340. BOLTE ET AL. *v.* SIDERS ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 77–341. PERATI *v.* BATTAION ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–342. ORKIN ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 140 Ga. App. 651, 231 S. E. 2d 481.

No. 77–350. O'BRIEN *v.* DUTCHIE, INC. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 581.

No. 77–353. COGDELL *v.* COGDELL ET AL. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 544 S. W. 2d 825.

No. 77–354. QUINN *v.* DONDLINGER & SONS CONSTRUCTION CO., INC. C. A. 10th Cir. Certiorari denied.

No. 77–356. CALL CARL, INC., ET AL. *v.* BP OIL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 554 F. 2d 623.

No. 77–358. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO *v.* COMMERCE TANKERS CORP. ET AL.; and

No. 77–376. COMMERCE TANKERS CORP. ET AL. *v.* NATIONAL MARITIME UNION OF AMERICA, AFL–CIO. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 793.

No. 77–362. ROBINSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 550 S. W. 2d 496.

No. 77–366. BLINDER ROBINSON & CO., INC. *v.* HALPERT OBERST & CO. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1208.

No. 77–367. FORD MOTOR CO. *v.* REA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 560 F. 2d 554.

No. 77–370. KENNY ET AL. *v.* CITY OF PHILADELPHIA; and MACDONALD ET AL. *v.* CITY OF PHILADELPHIA. Pa. Commw. Ct. Certiorari denied. Reported below: — Pa. Commw. —, 369 A. 2d 1343 (first case); — Pa. Commw. —, 369 A. 2d 1341 (second case).

No. 77–377. NEW JERSEY MANUFACTURERS INSURANCE CO. *v.* MOTOR CLUB FIRE & CASUALTY CO. ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 73 N. J. 425, 375 A. 2d 639.

No. 77–374. SLOAN *v.* BONIME ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 554.

No. 77–378. BANK OF NEW JERSEY *v.* NORTHWESTERN NATIONAL INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 557 F. 2d 365.

No. 77–379. FURR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 292 N. C. 711, 235 S. E. 2d 193.

No. 77–384. TATERKA *v.* WISCONSIN TELEPHONE CO. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1224.

No. 77–387. WILLIAMS ET AL. *v.* CITY OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 66 Ill. 2d 423, 362 N. E. 2d 1030.

No. 77–389. PERSON *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 554 F. 2d 534.

No. 77–403. AMALGAMATED DEVELOPMENT CO., INC., ET AL. *v.* COMMITTEE ON UNAUTHORIZED PRACTICE, DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 375 A. 2d 494.

No. 77–409. GOODWIN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 255 N. W. 2d 170.

No. 77–411. BENNETT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 563 F. 2d 879.

No. 77–415. SALYERS *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS ET AL. Cir. Ct., Coles County, Ill. Certiorari denied.

No. 77–437. MARTINEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1248.

No. 77–441. DICK *v.* UNITED STATES; and
No. 77–442. DICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–461. DIGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 266.

No. 77–462. KING *v.* UNITED STATES; and
No. 77–463. BOUCHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 122.

No. 77–469. ROCCO FERRERA & CO. *v.* MORRISON, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. Reported below: 554 F. 2d 290.

No. 77–5002. HRYNKOW *v.* BUTLER, CHAIRMAN, BOARD OF PROBATION AND PAROLE OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 77–5004. SALYER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 44 Ill. App. 3d 854, 358 N. E. 2d 1333.

No. 77–5011. DORRIS ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 141 Ga. App. 127, 232 S. E. 2d 590.

No. 77–5018. VELASQUEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1284.

No. 77–5025. MORGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 583.

No. 76–5029. HUGHES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5031. WILLIAMSON *v.* UNITED STATES; and
No. 77–5033. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 371.

No. 77–5034. POTE *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 804.

No. 77–5046. COOPER *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 571.

No. 77–5065. EVERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 1119.

No. 77–5070. LEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 77–5074. FORD *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 981.

No. 77–5097. SHEFFEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–5101. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 862.

No. 77–5118. PEDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 555 F. 2d 737.

No. 77–5120. GRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 77–5124. MCCRAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5134. CRAFT *v.* BOARD OF PARDONS AND PAROLES OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1054.

No. 77–5165. JUMPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1064.

No. 77–5187. HARGON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1390.

No. 77–5190. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 909.

No. 77–5193. FINCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 2d 1234.

No. 77–5205. MONTGOMERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 754.

No. 77–5220. DUBRAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 40.

No. 77–5231. WADE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 77–5233. HARRIS ET AL. *v.* HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 555 F. 2d 1357.

No. 77–5236. MIZE *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 77–5246. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–5248. BOYD *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 555 F. 2d 56.

No. 77–5263. MASSENGALE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 554 F. 2d 301.

No. 77–5274. DIMAIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5308. MCBRIDE *v.* DELTA AIR LINES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 551 F. 2d 113.

No. 77–5361. MORGAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 67 Ill. 2d 1, 364 N. E. 2d 56.

No. 77–5365. RODRIGUEZ *v.* FINKBEINER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1170.

No. 77–5367. BROGAN *v.* DEPARTMENT OF LABOR OF NEBRASKA ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–5368. MASSEY *v.* HUTTO, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied.

No. 77–5376. RODGERS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 280 Md. 406, 373 A. 2d 944.

No. 77–5383. ELDRIDGE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 266 Ind. 134, 361 N. E. 2d 155.

No. 77–5386. WILLIAMS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 343 So. 2d 1026.

No. 77–5391. CORBO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1279.

No. 77–5392. ENRIQUEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5394. BIONDO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 483, 362 N. E. 2d 576.

No. 77–5395. TYLER *v.* STANTON; and HOGAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 77–5398. SCOTT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5401. GREENFIELD *v.* GUNN. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 935.

No. 77–5405. MAY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 292 N. C. 644, 235 S. E. 2d 178.

No. 77–5407. GREENE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 77–5408. BANKS *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 564.

No. 77–5409. PATTERSON ET AL. *v.* LEEKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 1168.

No. 77–5412. GORDON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 259 Ark. 134, 529 S. W. 2d 330.

No. 77–5413. MANVILLE *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 581.

No. 77–5416. CONDO *v.* VINDICATOR PRINTING CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 77–5417. BROWN *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 77–5420. HOFFMAN *v.* BUONINFANTE. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 912, 366 N. E. 2d 1359.

No. 77–5425. MOBLEY *v.* RISTAINO. C. A. 1st Cir. Certiorari denied.

No. 77–5437. MORELLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 558 F. 2d 133.

No. 77–5446. MUNGO *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 77–5453. GOLDBACH *v.* CALIFORNIA SUPREME COURT ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–5457. WISE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 1180.

No. 77–5462. DAVIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 121, 561 F. 2d 1014.

No. 77–5471. POREBSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5485. HESSBROOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 468.

No. 77–5486. HICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 316.

No. 77–5491. STAVREDES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5496. HERZBERG ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 1219.

No. 77–5523. SANFARDINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5527. WASHINGTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 57 App. Div. 2d 739, 393 N. Y. S. 2d 631.

No. 76–1755. HOLLENBACH, JUDGE *v.* HAYCRAFT ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari, vacate judgment, and remand case for further consideration in light of *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977). MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 76–1796. OTTOBONI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of California Indian Legal Services for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 549 F. 2d 1271.

No. 76–1848. TRIBUNE PUBLISHING CO. ET AL. *v.* CALDERO. Sup. Ct. Idaho. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 98 Idaho 288, 562 P. 2d 791.

No. 77–5042. PRUDE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 66 Ill. 2d 470, 363 N. E. 2d 371.

No. 77–227. PHILIP MORRIS, INC. *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. Sup. Ct. P. R. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: — P. R. R. —.

No. 77–301. LEWIS ET AL. *v.* HYLAND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 554 F. 2d 93.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I dissent from the denial of the petition for certiorari.

Petitioners sought relief under 42 U. S. C. § 1983 on behalf of a class of persons who travel on the public highways and toll roads of New Jersey and who, it was alleged, have been subjected to a "pattern and practice" of unreasonable stops and searches by the New Jersey State Police. Petitioners' complaint further defined a subclass of "long-haired highway travelers," who allegedly have been subjected to illegal stops and searches solely because of their "highly individualized personal appearance." The Court of Appeals found the complaint sufficient to survive a motion to dismiss, *Lewis* v. *Kugler*, 446 F. 2d 1343 (CA3 1971), and petitioners then had an opportunity to prove their case against respondents, the Attorney General of New Jersey, the Superintendent of State Police, 14 named state police troopers, and a class of unnamed troopers.

At trial, according to the Court of Appeals, petitioners "substantiated (and, indeed, augmented) their initial allegations." 554 F. 2d 93, 94 (CA3 1977). The court summarized "[t]he district court's extensive findings of fact" as "reveal[ing] what can only be described as callous indifference by the New Jersey State Police for the rights of citizens using New Jersey roads." *Ibid.* In the view of the Court of Appeals, petitioners would clearly have been entitled to injunctive relief, "in light of [their] demonstration of numerous violations of their constitutional rights," were it not for this

Court's ruling in *Rizzo* v. *Goode*, 423 U. S. 362 (1976). 554 F. 2d, at 95.

Any lower court decision that reads a single opinion of this Court as effectuating a sharp change in the law deserves careful scrutiny before certiorari is denied, at least when the opinion does not claim to be making any such change. When the lower court's reading of our opinion results in the denial of relief to a large class of persons whose federal constitutional rights were repeatedly violated—as established by substantial evidence credited by the finder of fact, following the expenditure of many hours of judges' and litigants' time—a strong case is established for the granting of certiorari. When the opinion of this Court that is the sole cause of the denial of relief is grounded in particular facts and contains alternative rationales, the case for granting certiorari becomes compelling.

I joined my Brother BLACKMUN's dissenting opinion in *Rizzo* v. *Goode*, *supra*, and continue to believe that the case was wrongly decided. One can accept *Rizzo*, however, and yet view it as only one step in, rather than the end of, this Court's continuing effort to define the contours of § 1983 suits against public officials who, with varying degrees of personal participation, have allowed the violation of citizens' rights by subordinate employees. Certainly the lower courts have not found in *Rizzo* any unambiguous signal; to the contrary, they have given the opinion varying interpretations that suggest the need for guidance from this Court.[1]

[1] See, *e. g.*, *Duchesne* v. *Sugarman*, 566 F. 2d 817 (CA2 1977); *Youakim* v. *Miller*, 562 F. 2d 483, 491 (CA7 1977); *Washington Mobilization Committee* v. *Cullinane*, 184 U. S. App. D. C. 215, 566 F. 2d 107 (1977) (statements by Bazelon, C. J., and Leventhal, J., as to reasons for voting to deny rehearing en banc); *Butler* v. *Cooper*, 554 F. 2d 645, 647–648 (CA4 1977); *id.*, at 649–650 (dissenting opinion); *Welsch* v. *Likins*, 550 F. 2d 1122, 1131–1132 (CA8 1977); *Kite* v. *Kelley*, 546 F. 2d 334, 336–337 (CA10 1976); *Illinois Migrant Council* v. *Pilliod*, 540 F. 2d 1062, 1067–1068 (CA7 1976), modified in part on rehearing en banc, 548 F. 2d 715 (1977); 540 F. 2d, at 1072–1073 (dissenting opinion); *Sims* v. *Adams*, 537 F. 2d 829,

On its facts, moreover, this case is quite different from *Rizzo*. There, the extent of the defendant officials' knowledge of their subordinates' unconstitutional actions was uncertain; plaintiffs apparently proceeded on the theory that the officials had a duty to act to correct a statistical pattern of abuse, regardless of their knowledge of the pattern. See 423 U. S., at 376. Here, petitioners' evidence established that complaints about illegal searches were made to state police officials. The officials were, in the words of the Court of Appeals, "insensitiv[e]," "obliviou[s]," and "indifferen[t]" to these complaints. 554 F. 2d, at 101. A failure to act in the face of knowledge of subordinates' illegal actions is surely different from a failure to correct a statistical pattern of which one is not aware. Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 104–106 (1976) (distinguishing, for Eighth Amendment purposes, between "deliberate indifference" to prisoners' medical needs and accidental failure to provide adequate care).

There is thus a closer nexus here between the inaction of responsible officials and the violations of rights by subordinates than there was in *Rizzo*. In addition, the plaintiff class is narrower here,[2] named defendants have engaged in deliberate

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832 (CA5 1976); *Shifrin* v. *Wilson*, 412 F. Supp. 1282, 1301–1302, n. 22 (DC 1976).

[2] The class of New Jersey highway travelers and the subclass of long-haired highway travelers, though large and undifferentiated, nevertheless have more plainly identical interests with regard to police illegality than did the classes of all Philadelphia residents and all minority citizens that were certified in *Rizzo* v. *Goode*, see 423 U. S., at 366–367. Petitioners point out, moreover, that the plaintiff classes in *Rizzo* were coextensive with the city's electorate and thus had recourse to the political process to remedy official tolerance of abuse of civil rights, a factor that may have made the need for federal-court intervention appear less compelling. In the instant case, by contrast, many members of the class and subclass are interstate travelers who are merely driving through New Jersey and have no opportunity to correct official indifference through the State's political process.

wrongdoing,[3] and the injunctive relief sought is far less intrusive in terms of judicial interference with police operations.[4] Certiorari should be granted in this case to clarify the scope of the *Rizzo* decision.

No. 77–332. F. EBERSTADT & Co., INC., ET AL. *v.* TANNENBAUM ET AL. C. A. 2d Cir. Motion of Investment Company Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 552 F. 2d 402.

No. 77–401. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 922, ET AL. *v.* STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 57 App. Div. 2d 614, 393 N. Y. S. 2d 773.

No. 77–5019. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 558 F. 2d 1053.

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[3] In *Rizzo* the policemen who were found to have violated constitutional rights were not named as defendants, a factor twice emphasized by the Court. See 423 U. S., at 371, 375. The only named defendants were supervisory officials. *Id.*, at 364–365, n. 1. Here the defendants included the individual troopers who had committed illegal acts, as well as a class of unnamed troopers who had participated in the illegality. See 554 F. 2d, at 95 n. 3. The presence of the supervisory defendants in this case may thus have been for the purpose of shaping an effective remedy. Cf. *Hills* v. *Gautreaux*, 425 U. S. 284, 297 (1976) (once violation of rights is established, court of equity has broad power in fashioning remedy).

[4] The injunction in *Rizzo* "significantly revis[ed] the internal procedures of the Philadelphia police department." 423 U. S., at 379. Petitioners here, by contrast, would be content with "[a] simple notification from superiors to subordinates that they [may] not constitutionally stop and search vehicles solely because of the personal appearance of the occupants." Pet. for Cert. 23.

No. 77–5026. WITT *v.* FLORIDA. Sup. Ct. Fla.;
No. 77–5305. BURNS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 77–5355. SHIPPY *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 77–5464. PRYOR *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 77–5026, 342 So. 2d 497; No. 77–5305, 556 S. W. 2d 270; No. 77–5355, 556 S. W. 2d 246; No. 77–5464, 238 Ga. 698, 234 S. E. 2d 918.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 77–5207. KING *v.* UNITED STATES. C. A. 9th Cir. Motions of Russo et al. for leave to join in petition and certiorari denied. Reported below: 562 F. 2d 56.

Rehearing Denied

No. 76–6771. DIXON *v.* THOMPSON, WARDEN, *ante*, p. 843; and
No. 77–5216. TOWNSLEY *v.* BOARD OF PORT COMMISSIONERS, PORT OF OAKLAND, *ante*, p. 807. Petitions for rehearing denied.

No. 76–6616. BRADINGTON *v.* INTERNATIONAL BUSINESS MACHINES CORP., 431 U. S. 974; and
No. 76–6998. MASON ET AL. *v.* CALLAWAY ET AL., *ante*, p. 877. Petitions for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

NOVEMBER 2, 1977

Miscellaneous Order

No. A–396 (77–529). WISE, MAYOR OF DALLAS, ET AL. *v.* LIPSCOMB ET AL. C. A. 5th Cir. Application for injunction,

presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

NOVEMBER 7, 1977

Certiorari Granted—Vacated and Remanded. (See also No. 76–6194, *ante*, p. 22.)

No. 76–1644. GUNN, WARDEN *v.* POULIN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Reported below: 548 F. 2d 1379.

Miscellaneous Orders

No. A–222. MECOM *v.* UNITED STATES. C. A. 5th Cir. Application for reduction of bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–302 (77–5353). MINCEY *v.* ARIZONA. Application for stay of the mandate of the Supreme Court of Arizona, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–328 (77–5431). TYLER *v.* DYER, CLERK, CIRCUIT COURT OF PLATTE COUNTY. C. A. 8th Cir. Application for stay of state court proceedings, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–332. GILBERT ET AL. *v.* LEIGHTON, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Application for stay of injunction, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. A–352 (77–526). CHITTY *v.* UNITED STATES; and POSTAL *v.* UNITED STATES. C. A. 5th Cir. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–121. IN RE DISBARMENT OF SKONTOS. It is ordered that George John Skontos, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 76–1596. UNITED STATES *v.* MAURO ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 816.] Motion for appointment of counsel granted, and it is ordered that Kevin Ross, Esquire, of Kew Gardens, N. Y., be appointed to serve as counsel for respondents in this case.

No. 76–1767. NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 815.] Motion of petitioner for leave to file the Court of Appeals appendix in lieu of an appendix as prescribed by this Court's Rule 39 granted.

No. 76–6860. GUTIERREZ *v.* SINGLETON, U. S. DISTRICT JUDGE; and

No. 77–5436. HOLSEY *v.* HAYNSWORTH, U. S. CIRCUIT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 77–262. DUKE POWER CO. *v.* CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL.; and

No. 77–375. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL. Appeals from D. C. W. D. N. C. Motions of Pacific Legal Foundation and Southeastern Legal Foundation for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 431 F. Supp. 203.

Certiorari Denied

No. 76–1843. OLLESTEAD ET AL. *v.* NATIVE VILLAGE OF TYONEK. Sup. Ct. Alaska. Certiorari denied. Reported below: 560 P. 2d 31.

No. 76–6956. BURSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1205.

No. 76–6982. BRICKHOUSE *v.* ZAHRADNICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 340.

No. 77–54. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 261.

No. 77–96. BRITISH AMERICAN COMMODITY OPTIONS CORP. ET AL. *v.* BAGLEY, CHAIRMAN, COMMODITY FUTURES TRADING COMMISSION, ET AL.; and

No. 77–204. NATIONAL ASSOCIATION OF COMMODITY OPTION DEALERS ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 2d 482.

No. 77–192. STEBBINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 39.

No. 77–244. LEE PHARMACEUTICALS *v.* DEN-MAT, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–254. DISCOUNT CO., INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 567, 554 F. 2d 435.

No. 77–278. CHAMPION INTERNATIONAL CORP. *v.* UNITED STATES;

No. 77–281. YOUNG & MORGAN, INC., ET AL. *v.* UNITED STATES; and

No. 77–282. FRERES LUMBER CO., INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 557 F. 2d 1270.

No. 77–257. BERGEN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 609, 562 F. 2d 1197.

No. 77–300. KANANEN *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied. Reported below: 555 F. 2d 667.

No. 77–310. SMITH, TREASURER OF ILLINOIS, ET AL. *v.* SNOW ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 66 Ill. 2d 443, 362 N. E. 2d 1052.

No. 77–313. MASON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1069.

No. 77–363. CITY OF MIAMI BEACH *v.* JACOBS, DBA PARK APARTMENT HOTEL, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 341 So. 2d 236.

No. 77–385. DAVIS *v.* DAVIS. Ct. App. Md. Certiorari denied. Reported below: 280 Md. 119, 372 A. 2d 231.

No. 77–386. FLANNIGAN *v.* BAILAR, POSTMASTER GENERAL OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1068.

No. 77–394. MANSON, CORRECTIONS COMMISSIONER *v.* MOYNAHAN. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1204.

No. 77–398. FORTUNA CORP. *v.* WILKERSON. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 745.

No. 77–402. FERGUSON *v.* BOARD OF TRUSTEES OF BONNER COUNTY SCHOOL DISTRICT NO. 82 ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 98 Idaho 359, 564 P. 2d 971.

No. 77–407. DIAZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 876, 362 N. E. 2d 609.

No. 77–423. BERRY ET AL., JUDGES *v.* JUDICIARY COMMISSION OF LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 346 So. 2d 676.

No. 77–426. IN RE WULIGER. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 77–465. KETCHUM ET AL. *v.* GREEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 557 F. 2d 1022.

No. 77–507. BRUNO *v.* KALMICH. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 2d 549.

No. 77–511. BENEKY *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 920, 366 N. E. 2d 1349.

No. 77–5020. BIAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 561 P. 2d 523.

No. 77–5022. PAUL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 281, 551 F. 2d 467.

No. 77–5036. SCHOLLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 1109.

No. 77–5049. WALLACE *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 552 F. 2d 721.

No. 77–5057. JACKSON *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 807.

No. 77–5112. GIBSON *v.* MISSOURI. Ct. App. Mo., Kansas City Dist. Certiorari denied. Reported below: 547 S. W. 2d 861.

No. 77–5140. HUDSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 986, 392 N. Y. S. 2d 527.

No. 77–5142. PROCTOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1034.

No. 77–5152. SIMPSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–5166. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 504.

No. 77–5179. TOON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–5237. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 112.

No. 77–5255. PAPINI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–5273. TRAMMELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 77–5293. HARTFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 575.

No. 77-5322. BAMOND *v.* SOLICITOR GENERAL OF THE UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–5323. BRINKLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 871.

No. 77–5335. VICKERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 578.

No. 77–5339. WADE *v.* SHELL, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied.

No. 77–5429. MAYO *v.* BOMBARD, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1204.

No. 77–5430. SHERMAN *v.* SAFEWAY STORES, INC., ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–5432. RICHARDSON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 555 S. W. 2d 411.

No. 77–5434. GREEN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5435. DOAK, AKA McDONALD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5438. CRUM *v.* WALTER H. BRYAN, INC., ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 346 So. 2d 1252.

No. 77–5442. ROZELL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 229.

No. 77–5444. SALOUKAS *v.* CODD, POLICE COMMISSIONER OF THE CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 77–5451. BOTTOS *v.* RUMAN ET AL. Ct. App. Ind. Certiorari denied.

No. 77–5463. HOLSEY *v.* MARYLAND COURT OF APPEALS. Ct. App. Md. Certiorari denied.

No. 77–5487. RAYSOR *v.* WOLF & CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 39.

No. 77–5498. STUART *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 77–5500. GRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 77–5517. DOHERTY *v.* OUTAGAMIE BANK. C. A. 7th Cir. Certiorari denied.

No. 77–5528. HIGHTOWER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 564 F. 2d 620.

No. 77–5530. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 50.

No. 77–5531. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 561 F. 2d 1301.

No. 77–5537. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 562 F. 2d 56.

No. 77–258. JAGO, CORRECTIONAL SUPERINTENDENT *v.* PAPP. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 559 F. 2d 1220.

No. 77–382. BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* VECCHIONE ET AL. C. A. 3d Cir. Motion of respondents Ragone et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 558 F. 2d 150.

No. 77–290. COLE *v.* UNITED STATES. Ct. Cl. Motion to proceed as a veteran granted. Certiorari denied.

No. 77–414. CAPE PUBLICATIONS, INC., ET AL. *v.* ADAMS. Dist. Ct. App. Fla., 4th Dist. Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 336 So. 2d 1197.

No. 77–433. HOWELL *v.* DALLAS BAR ASSN. ET AL. C. A. 5th Cir. Motion for consideration with No. 76–1750, *Stump* v. *Sparkman* [certiorari granted, *ante*, p. 815], and certiorari denied. Reported below: 551 F. 2d 861.

Rehearing Denied

No. 76–6593. CLARK *v.* UNITED STATES, *ante*, p. 839;

No. 76–6939. GUZMAN *v.* JONES ET AL., *ante*, p. 813;

No. 76–6967. SHAW ET AL. *v.* MERRITT-CHAPMAN & SCOTT CORP. ET AL., *ante*, p. 852;

No. 77–5053. SHAW *v.* THOMPSON, WARDEN, *ante*, p. 864; and

No. 77–5283. THERIAULT ET AL. *v.* SILBER ET AL., *ante*, p. 871. Petitions for rehearing denied.

No. 77–131. DELAWARE STATE BOARD OF EDUCATION ET AL. *v.* EVANS ET AL.;

No. 77–223. CLAYMONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL.;

No. 77–235. NEWARK SCHOOL DISTRICT *v.* EVANS ET AL.;

No. 77–236. NEW CASTLE-GUNNING BEDFORD SCHOOL DISTRICT *v.* EVANS ET AL.; and

No. 77–239. MARSHALLTON-MCKEAN SCHOOL DISTRICT *v.* EVANS ET AL., *ante*, p. 880. Petition for rehearing denied. MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

NOVEMBER 9, 1977

Miscellaneous Order

No. A–406. MORIAL ET AL. *v.* JUDICIARY COMMISSION OF LOUISIANA ET AL. Application for stay of order of the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

NOVEMBER 14, 1977

Dismissal Under Rule 60

No. 77–5163. WILLIAMS *v.* WARD, CORRECTIONAL COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 556 F. 2d 1143.

Appeals Dismissed

No. 77–471. MCDOUGAL *v.* COUNTY OF IMPERIAL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 19 Cal. 3d 505, 564 P. 2d 14.

No. 77–502. MUSS ET AL. *v.* CITY OF MIAMI BEACH. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed for want of substantial federal question. Reported below: 339 So. 2d 236.

Certiorari Granted—Vacated and Remanded

No. 76–1377. OREGON STATE PENITENTIARY ET AL. *v.* HAMMER. Sup. Ct. Ore. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of *Dixon* v. *Love*, 431 U. S. 105 (1977). Reported below: 276 Ore. 651, 556 P. 2d 1348.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

Since *Dixon* v. *Love*, 431 U. S. 105, sheds no light on the issues decided by the Oregon Supreme Court, the Court's disposition of this petition can only be characterized as cavalier.

The respondent, a tenured corrections officer, was discharged without a pretermination hearing; at a post-termination hearing the Public Employee Relations Board decided that the dismissal was proper as a matter of state law. On appeal, the Oregon Supreme Court reversed. Relying on its decision in *Tupper* v. *Fairview Hospital & Training Center*, 276 Ore. 657, 556 P. 2d 1340 (1976), the court concluded that procedural due process required that a tenured employee receive notice of the charges against him and the proposed sanction, as well as an opportunity to respond, before being discharged. It further held that respondent was entitled to backpay and other benefits from the time of his discharge until such time as a proper termination hearing is held, even though the discharge had been upheld at the post-termination hearing.[1]

No decision of this Court is controlling on either the due process issue or the remedy issue decided by the Oregon Supreme Court. In *Dixon* v. *Love*, *supra*, this Court held that

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[1] The Oregon Court of Appeals had held that respondent was entitled to a pretermination hearing, but it limited the award of back wages to the period between the date of his dismissal and the date of his subsequent hearing. 23 Ore. App. 743, 543 P. 2d 1094 (1975).

the Illinois regulation providing for the automatic suspension of the license of a driver who had been convicted repeatedly for traffic offenses was constitutionally valid. In so holding, the Court relied on the fact that the driver "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based," 431 U. S., at 113; on the fact that the suspension and revocation decisions were "largely automatic" under the Illinois regulations, *ibid.;* and on "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." *Id.*, at 114. None of those factors, decisive in *Dixon,* has any relevance to the issues decided by the Oregon Supreme Court in this case.

Indeed, in *Dixon* the premise for the Court's legal analysis was " 'that something less than an evidentiary hearing is sufficient prior to adverse administrative action.' " *Id.*, at 113, quoting *Mathews* v. *Eldridge,* 424 U. S. 319, 343. Precisely the same premise provided the basis for the legal analysis of the Oregon Supreme Court. The court held that a pretermination evidentiary hearing was not required, but that "something less" was necessary—in this case, fair notice and an opportunity to respond. Whether or not that holding is correct, it is not even arguably inconsistent with either the holding or anything said by this Court in *Dixon.* Nor is there anything in *Dixon* which remotely relates to the question whether the remedy directed by the Oregon Supreme Court was proper.

In my judgment, even assuming that the Oregon Supreme Court has extended greater procedural protection to Oregon residents than the Federal Constitution requires, there is no need for this Court to address those issues until a conflict with the Oregon holding has developed on a national level. But if my judgment in this respect is incorrect, and enlightenment on a nationwide basis is indeed appropriate, surely the Court should provide something more edifying than a cryptic reference to a case as wide of the mark as *Dixon* v. *Love.* This

summary treatment of a carefully reasoned decision of the highest court of the State of Oregon fails to accord proper respect to that tribunal and gives no guidance whatsoever for further proceedings in this litigation. Cf. *United States* v. *Jacobs*, 429 U. S. 909 (STEVENS, J., concurring).[2]

I respectfully dissent.

No. 77–277. JACKSON *v.* UNITED STATES. Ct. Cl. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief filed October 25, 1977. MR. JUSTICE REHNQUIST would deny the petition. Reported below: 213 Ct. Cl. 354, 551 F. 2d 282.

No. 77–5161. JOHNSON *v.* HAMPTON, JUDGE. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated, and case remanded for further consideration in light of *Brown* v. *Ohio*, 432 U. S. 161 (1977), and *Harris* v. *Oklahoma*, 433 U. S. 682 (1977). Reported below: 564 P. 2d 641.

Miscellaneous Orders

No. ———. MARK TRAIL CAMPGROUNDS, INC. *v.* FIELD ENTERPRISES, INC., ET AL., 431 U. S. 911. Motion for reconsideration denied.

No. A–379 (77–704). GIBBS *v.* UNITED STATES. C. A. 5th Cir. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–381 (Nos. 77–26 and 77–32). CHIN *v.* UNITED STATES. Application for an order directing the United States Court of Appeals for the Second Circuit to issue a printed opinion, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

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[2] Although four of us disagree with the Court's disposition of this case, the Justices who join this opinion do not insist that the case be orally argued. See *Trinkler* v. *Alabama*, 418 U. S. 917, 918 (BRENNAN, J., dissenting).

No. A–384. WALKER *v.* ILLINOIS. Application for writ of habeas corpus, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–100. IN RE DISBARMENT OF OOMS. Owen Jennings Ooms, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on April 4, 1977 [430 U. S. 952], is hereby discharged.

No. D–107. IN RE DISBARMENT OF FRIEDLAND. Disbarment entered. [For earlier order, see 431 U. S. 913.]

No. 72, Orig. SOUTH DAKOTA *v.* NEBRASKA. Exception of South Dakota to the Report of the Special Master overruled. Motion of Robert J. Foley et al. for leave to intervene as defendants granted. [For earlier order herein, see 432 U. S. 904.]

No. 76–682. SANTA CLARA PUEBLO ET AL. *v.* MARTINEZ ET AL. C. A. 10th Cir. [Certiorari granted, 431 U. S. 913.] Motion of the Solicitor General of the United States for leave to file a brief as *amicus curiae* denied.

No. 76–1121. AMERICAN BROADCASTING COMPANIES, INC., ET AL. *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL.;

No. 76–1153. ASSOCIATION OF MOTION PICTURE & TELEVISION PRODUCERS, INC. *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL.; and

No. 76–1162. NATIONAL LABOR RELATIONS BOARD *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 430 U. S. 982.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 76–777. CONNOR ET AL. *v.* FINCH, GOVERNOR OF MISSISSIPPI, ET AL.;

No. 76–933. FINCH, GOVERNOR OF MISSISSIPPI, ET AL. *v.* CONNOR ET AL.;

No. 76–934. UNITED STATES *v.* FINCH, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 76–935. CONNOR ET AL. *v.* FINCH, GOVERNOR OF MISSISSIPPI, ET AL., 431 U. S. 407. Motion to retax costs denied.

No. 76–1143. MARSHALL, SECRETARY OF LABOR, ET AL. *v.* BARLOW'S, INC. D. C. Idaho. [Probable jurisdiction noted, 430 U. S. 964.] Motion of Pacific Legal Foundation for leave to participate in oral argument as *amicus curiae* denied.

No. 76–1359. BANKERS TRUST CO. *v.* MALLIS ET AL. C. A. 2d Cir. [Certiorari granted, 431 U. S. 928.] Motion of New York Clearing House Assn. for leave to participate in oral argument as *amicus curiae* granted.

No. 76–5729. OLIPHANT *v.* SUQUAMISH INDIAN TRIBE ET AL.; and BELGARDE *v.* SUQUAMISH INDIAN TRIBE ET AL. C. A. 9th Cir. [Certiorari granted, 431 U. S. 964.] Motion of the United States for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument.

No. A–278 (77–452). MOBIL ALASKA PIPELINE CO. *v.* UNITED STATES ET AL.;

No. A–280 (77–457). EXXON PIPELINE CO. *v.* UNITED STATES ET AL.;

No. A–319 (77–551). BP PIPELINES, INC. *v.* UNITED STATES ET AL.; and

No. A–376 (77–602). ARCO PIPE LINE CO. *v.* UNITED STATES ET AL. C. A. 5th Cir.

On October 20, 1977 [*ante*, p. 913], this Court stayed the order of the Interstate Commerce Commission served June 28,

1977, in its Investigation and Suspension Docket No. 9164, Trans Alaska Pipeline System (Rate Filings), pending final disposition of the petitions for writ of certiorari by this Court. To further effectuate that order, it is hereby ordered:

1. During the period the stay is in effect, commencing at 3 p. m., e. d. t., October 20, 1977, the following pipeline companies may collect their respective rates set forth in the tariffs that were suspended by the Interstate Commerce Commission in its order of June 28, 1977:

Amerada Hess Pipeline Corporation
ARCO Pipe Line Company
BP Pipelines, Inc.
Mobil Alaska Pipeline Company
Sohio Pipe Line Company
Exxon Pipeline Company
Union Alaska Pipeline Company

2. The Federal Energy Regulatory Commission may proceed with its investigation of the rates set forth in said tariffs (FERC Docket No. OR78–1) and in connection with that investigation may enter any appropriate orders not inconsistent with either this order or this Court's order of October 20, 1977.

3. During the period the stay is in effect, the pipeline companies shall keep account of all sums collected under the terms of said tariffs by virtue of the stay entered by this Court.

4. In the event certiorari is denied or it is otherwise ultimately determined that said pipeline companies were not lawfully entitled to collect a portion of the rates so collected, the pipeline companies shall refund such portion of said rates, with interest computed in accordance with Section 15 (8)(e) of the Interstate Commerce Act, as amended, 90 Stat. 38, 49 U. S. C. A. § 15 (8)(e) (Supp. 1977), to the persons entitled thereto without further order of this Court.

MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this order.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I initially joined in granting a stay in these cases. Upon further consideration, however, I am convinced that our stay was improvidently and precipitately issued and that it should now be dissolved.

Applicants will be able to collect approximately $1.5 million per day by virtue of our stay that would not be collected were the suspension order of the Interstate Commerce Commission—which is the subject of petitions for certiorari in this case [1]—to remain in effect. Because of the enormous sums of money that will be collected under our stay, over $100 million by January 28, 1978, when the suspension order of the ICC ends by its terms, the Court should be very clear before continuing this stay that it is really needed to protect applicants and, more importantly, that the provisions of the stay adequately protect the interests of anyone who may be affected by this litigation. On the pleadings so far before us, I am not convinced that the Court is in a position to act with any such conviction.

First, with respect to the need for the stay, it is important to recognize that each applicant comes before this Court in a dual capacity: Each is both a part owner of the Trans Alaska Pipeline System *and* a shipper of oil over the pipeline. Therefore some amounts which an applicant would be prevented from collecting under the suspension order would immediately be recouped as extra profit to that applicant in its capacity as a shipper. This is not to suggest that the gains would offset the losses with any precision, but only that the net losses may be sufficiently small that extraordinary equitable relief would not be appropriate.

My greater concern, however, is that the form of our stay may not adequately protect the ultimate consumers of oil

[1] For a discussion of the background of this litigation, see *Mobil Alaska Pipeline Co.* v. *United States*, 557 F. 2d 775 (CA5 1977).

shipped over the pipeline or the interests of shippers or holders of royalty interests in the oil at Prudhoe Bay. Although the applicants aver that the "landed price" of oil in the United States will not be affected by our stay and therefore that consumers of Alaskan oil will not face higher prices because of our order, I am not prepared to accept these unexplained statements on the record presently before us. Nor do I think the interest which applicants are today ordered to pay on any amounts ultimately ordered refunded is sufficient to reimburse shippers and royalty holders for the costs they may incur as a consequence of our stay. The only information we have as to what those costs may be is the statement of the Arctic Slope Regional Corp.[2] that it will have to borrow at an estimated interest of 10% amounts equal to the royalties it would have had but for our stay. Nonetheless, the Court today sets the interest to be paid on amounts refunded at the rate prescribed by 49 U. S. C. § 15 (8)(e) (1976 ed.), which applies only to railroad tariffs and is today somewhere below 7%.[3] Indeed, in adopting this rate, the Court today rejects what is to me the much more reasonable suggestion of the Solicitor General that the interest be set at 9%, which is the rate prescribed by the Federal Power Commission for tariff refunds from natural gas pipelines.[4]

For the reasons stated above, I would vacate the stay ordered by this Court on October 20, 1977, and order proceedings on the petitions for certiorari to be expedited. Barring

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[2] Arctic Slope is the representative of the Inupiat Eskimos who have a claim to be paid 2% of the wellhead value of Alaskan crude oil up to a total of $500 million as consideration for their surrender of aboriginal land claims in the Prudhoe Bay area.

[3] Section 15 (8)(e) sets the rate of interest at "a rate which is equal to the average yield . . . of marketable securities of the United States which have a duration of 90 days."

[4] See 18 CFR § 154.67 (c)(2) (1977).

this, I would have entered the form of stay order suggested by the Solicitor General.

MR. JUSTICE BLACKMUN, dissenting.

I, too, conclude that the Court's stay was improvident. I agree with the conclusions reached by MR. JUSTICE BRENNAN and would vacate the stay issued by this Court on October 20, would accelerate consideration of the petitions for certiorari, and would follow the suggestions of the Solicitor General as to the rate of interest.

No. 77–5353. MINCEY *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 902.] Motion of petitioner for appointment of counsel granted, and it is ordered that Richard Oseran, Esquire, of Tucson, Ariz., be appointed to serve as counsel for petitioner.

No. 77–5629. HANCOCK *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 77–5522. THERIAULT *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 77–334. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BOSTON ET AL. *v.* TAX COMMISSION OF MASSACHUSETTS ET AL. Appeal from Sup. Jud. Ct. Mass. Probable jurisdiction noted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: —— Mass. ——, 363 N. E. 2d 474.

No. 77–454. MOORMAN MANUFACTURING CO. *v.* BAIR, DIRECTOR OF REVENUE OF IOWA. Appeal from Sup. Ct. Iowa. Motions of William J. Baumol et al., Motor Vehicle Manufacturers Association of the United States, Inc., Multistate Tax Commission, and Committee on State Taxation of the Council of State Chambers of Commerce for leave to file briefs

as *amici curiae* granted. Probable jurisdiction noted. Reported below: 254 N. W. 2d 737.

Certiorari Granted

No. 76–1701. TENNESSEE VALLEY AUTHORITY *v.* HILL ET AL. C. A. 6th Cir. Motion of Eastern Band of Cherokee Indians for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 549 F. 2d 1064.

No. 76–1836. COOPERS & LYBRAND *v.* LIVESAY ET AL.; and
No. 76–1837. PUNTA GORDA ISLES, INC. *v.* LIVESAY ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 550 F. 2d 1106.

Certiorari Denied. (See also No. 76–1057, *ante*, at 68 n. 15.)

No. 76–1831. MASSLER *v.* UNITED STATES;
No. 76–1833. RICE ET AL. *v.* UNITED STATES; and
No. 76–1839. ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1364.

No. 76–6974. DEVAUGHN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 575.

No. 76–6977. SANDOVAL-ROMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1225.

No. 76–6986. SIERRA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 528.

No. 77–104. CONSOLIDATED RAIL CORP. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 197, 567 F. 2d 64.

No. 77–116. RUSSELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 551 S. W. 2d 710.

No. 77–135. YARMOSH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 39.

No. 77–159. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFFILIATED LOCAL UNION 597 *v.* LINBECK CONSTRUCTION CORP. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 948.

No. 77–175. STROUP *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 552 S. W. 2d 418.

No. 77–231. NACHBAUR *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1204.

No. 77–317. GRATEHOUSE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 288, 553 F. 2d 105.

No. 77–346. HARMONT PLAZA, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 414.

No. 77–351. ALABAMA *v.* ROCKAWAY CORP. Ct. Civ. App. Ala. Certiorari denied. Reported below: 346 So. 2d 444.

No. 77–449. HOULIHAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 551 S. W. 2d 719.

No. 77–455. RUSSOM ET AL. *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 439.

No. 77–456. PATCH ET AL. *v.* WHITE, MAYOR OF BOSTON, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 559 F. 2d 1200.

No. 77–460. GARGALLO *v.* GARGALLO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 77–464. STORER ET AL., CO-EXECUTORS *v.* STORER. Sup. Ct. Fla. Certiorari denied. Reported below: 346 So. 2d 994.

No. 77–467. CHAPMAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 73 Mich. App. 547, 252 N. W. 2d 511.

No. 77–476. TOWN OF NORWOOD, MASSACHUSETTS, ET AL. *v.* BOSTON EDISON CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 222, 557 F. 2d 845.

No. 77–479. ALBANO *v.* JORDAN MARSH CO. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 362 N. E. 2d 219.

No. 77–485. KEISTER ET AL. *v.* SAN DIEGO & ARIZONA EASTERN RAILROAD. C. A. 9th Cir. Certiorari denied. Reported below: 562 F. 2d 55.

No. 77–491. MYERS *v.* BUTLER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 556 F. 2d 398.

No. 77–514. MCDONALD *v.* HEADRICK, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 253.

No. 77–517. DOLWIG *v.* UNITED STATES;

No. 77–518. VOGT *v.* UNITED STATES; and

No. 77–541. STRADLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 958.

No. 77–537. LARRY L. *v.* VERONICA P. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 898, 366 N. E. 2d 1342.

No. 77–546. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 655.

No. 77–549. AGEE *v.* UNITED STATES; and

No. 77–550. RENFRO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–547. FREELAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 562 F. 2d 383.

No. 77–561. SCHMALTZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 558.

No. 77–5093. KESLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–5148. JORDAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 612.

No. 77–5175. LUMPKIN *v.* RICKETTS, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 680.

No. 77–5196. SMITH *v.* BRITT ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–5206. ROBERTS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 571 P. 2d 129.

No. 77–5240. SMITH *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 558 F. 2d 691.

No. 77–5249. JEFFERSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1222.

No. 77–5272. GOODE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5347. BRAGER *v.* RIGGSBY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 77–5377. CHEYENNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 902.

No. 77–5411. FRAZIER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 1118.

No. 77–5459. HARRISON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5465. ULREY, AKA TALIFERRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 561 F. 2d 8.

No. 77–5472. LAGRONE *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 77–5473. TAYLOR *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 77–5480. PHILLIPS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 77–5481. BARTLETT *v.* TOLEDO BLADE CO., INC. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 77–5483. DRAYTON *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 644.

No. 77–5484. MATTISON ET AL. *v.* LEEKE, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari before judgment denied.

No. 77–5493. PARKER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 142 Ga. App. 195, 235 S. E. 2d 585.

No. 77–5499. FORD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 609, 391 N. Y. S. 2d 839.

No. 77–5504. ROLLINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–5505. CONTRERAS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5514. SMITH *v.* WHITE STORES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1389.

No. 77–5536. MOTEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 564 F. 2d 620.

No. 77–5544. WATSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5551. SAUNDERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5566. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5568. GIBSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 65, 561 F. 2d 958.

No. 77–5579. RAMSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 50.

No. 77–5583. FULLMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5589. DURNS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 542.

No. 77–5592. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 93.

No. 77–5594. WITHERSPOON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5599. DANIELS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 93.

No. 77–5600. SNYDER *v.* UNITED STATES C. A. 9th Cir. Certiorari denied. Reported below: 562 F. 2d 57.

No. 77–5602. SANSONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 527.

No. 77–361. WALKER, GOVERNOR OF ILLINOIS, ET AL. *v.* HAYES. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 555 F. 2d 625.

No. 77–5156. JEFFRIES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 559 F. 2d 1222.

No. 77–5215. PITTMAN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 555 F. 2d 551.

No. 77–5285. SCOTT *v.* PAROLE BOARD OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 556 F. 2d 805.

No. 77–5488. BLAKE *v.* GEORGIA. Sup. Ct. Ga.; and
No. 77–5538. SPENKELINK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 77–5488, 239 Ga. 292, 236 S. E. 2d 637; No. 77–5538, 350 So. 2d 85.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 76–1468. HENDRIX *v.* UNITED STATES, *ante*, p. 818;
No. 76–1566. COMLY *v.* LOWER SOUTHAMPTON TOWNSHIP, *ante*, p. 803;
No. 76–1674. STEPHENSON ET AL. *v.* DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES OF FLORIDA, *ante*, p. 803;
No. 76–1691. MATASSINI *v.* UNITED STATES, *ante*, p. 828;
No. 76–1722. HIGGINBOTHAM, ADMINISTRATRIX, ET AL. *v.* MOBIL OIL CORP. ET AL., *ante*, p. 830;
No. 76–6379. POSNER *v.* UNITED STATES, *ante*, p. 837; and
No. 76–6673. DISILVESTRO *v.* VETERANS' ADMINISTRATION, *ante*, p. 840. Petitions for rehearing denied.

No. 76–6685. KELLEY *v.* BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL., *ante*, p. 841;

No. 76–6696. CARDALL *v.* UNITED STATES, *ante*, p. 841;

No. 76–6748. BRUNSON *v.* UNITED STATES, *ante*, p. 842;

No. 76–6774. KIRK *v.* UNITED STATES, *ante*, p. 896;

No. 76–6823. NEAL *v.* ARKANSAS, *ante*, p. 878;

No. 76–6896. WINDHAM *v.* CALIFORNIA, *ante*, p. 848;

No. 76–6933. SIMANTS *v.* NEBRASKA, *ante*, p. 878;

No. 77–27. LANDMESSER *v.* UNITED STATES, *ante*, p. 855;

No. 77–61. LEIGH *v.* OKLAHOMA EX REL. TAX COMMISSION OF OKLAHOMA, *ante*, p. 804;

No. 77–5040. KRAMER *v.* UNITED STATES, *ante*, p. 863;

No. 77–5099. SMITH, AKA MACHETTI *v.* GEORGIA, *ante*, p. 878;

No. 77–5136. CORBITT *v.* UNITED STATES, *ante*, p. 868;

No. 77–5138. REYNOLDS *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL., *ante*, p. 893;

No. 77–5182. SUNDAY *v.* UNITED STATES DISTRICT COURT, *ante*, p. 869; and

No. 77–5279. JENNINGS *v.* DAY, WARDEN, *ante*, p. 871. Petitions for rehearing denied.

NOVEMBER 28, 1977*

Appeals Dismissed

No. 77–5502. DOUGLAS *v.* UNITED STATES ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–5269. SIMPSON *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Reported below: 347 So. 2d 414.

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*MR. JUSTICE BLACKMUN took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

No. 77–419. HOUSTON BELT & TERMINAL RAILWAY CO. *v.* WHERRY. Appeal from Ct. Civ. App. Tex., 1st Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 548 S. W. 2d 743.

No. 77–5561. JONES *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 193 Colo. 250, 565 P. 2d 1333.

Vacated and Remanded on Appeal

No. 76–1588. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCMAHON. Appeal from D. C. E. D. N. Y. Motion of appellee for leave to proceed *in forma pauperis* granted, judgment vacated, and case remanded for further consideration in light of *Califano* v. *Jobst, ante,* p. 47.

Certiorari Granted—Vacated and Remanded

No. 77–53. PIERRE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded to consider question of mootness. Reported below: 547 F. 2d 1281.

No. 77–5069. NUNLEY *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment of the United States Court of Appeals for the Sixth Circuit vacated and case remanded to the United States District Court for the Western District of Tennessee with directions to dismiss the indictment. Reported below: 556 F. 2d 583.

Miscellaneous Orders

No. 75–1690. PARHAM, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF GEORGIA, ET AL. *v.* J. L. ET AL. Appeal from D. C. M. D. Ga. [Probable jurisdiction noted, 431 U. S. 936.] Motion of the Solicitor General for leave to file a brief as *amicus curiae* granted.

No. 76–419. VERMONT YANKEE NUCLEAR POWER CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 76–528. CONSUMERS POWER CO. *v.* AESCHLIMAN ET AL. C. A. D. C. Cir. [Certiorari granted, 429 U. S. 1090.] Motion of the Attorney General of New York for leave to participate in oral argument as *amicus curiae* denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.*

No. 76–811. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* BAKKE. Sup. Ct. Cal. [Certiorari granted, 429 U. S. 1090.] Motion of the Solicitor General for leave to file a supplemental brief after argument, as *amicus curiae*, granted.

No. 76–1359. BANKERS TRUST CO. *v.* MALLIS ET AL. C. A. 2d Cir. [Certiorari granted, 431 U. S. 928.] Motions of the Solicitor General for leave to file a brief as *amicus curiae* and to participate in oral argument as *amicus curiae* granted.

No. 77–533. HISQUIERDO *v.* HISQUIERDO. Sup. Ct. Cal. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–565. ERNEST *v.* SIRICA, U. S. DISTRICT JUDGE, ET AL.; and

No. 77–5256. NORMAN *v.* CHRIST, CLERK, U. S. DISTRICT COURT. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 77–653. SWISHER, STATE'S ATTORNEY FOR BALTIMORE CITY, ET AL. *v.* BRADY ET AL. Appeal from D. C. Md. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 436 F. Supp. 1361.

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*See also note, *supra*, p. 961.

No. 77–404. CITY OF PHILADELPHIA ET AL. *v.* NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. Probable jurisdiction noted. Reported below: 73 N. J. 562, 376 A. 2d 888.

Certiorari Granted

No. 77–380. ANDRUS, SECRETARY OF THE INTERIOR *v.* CHARLESTONE STONE PRODUCTS CO., INC. C. A. 9th Cir. Certiorari granted. Reported below: 553 F. 2d 1209.

No. 77–452. MOBIL ALASKA PIPELINE CO. *v.* UNITED STATES ET AL.;

No. 77–457. EXXON PIPELINE CO. *v.* UNITED STATES ET AL.;

No. 77–551. BP PIPELINES, INC. *v.* UNITED STATES ET AL.; and

No. 77–602. ARCO PIPE LINE CO. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.* Reported below: 557 F. 2d 775.

No. 77–5549. TAYLOR *v.* KENTUCKY. Ct. App. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 551 S. W. 2d 813.

Certiorari Denied. (See also Nos. 77–419 and 77–5502, *supra.*)

No. 76–1776. PEABODY *v.* UNITED STATES;

No. 76–6907. CASON *v.* UNITED STATES; and

No. 76–6926. THARP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 556 F. 2d 584.

No. 76–1779. CHAZIN *v.* WITKOVICH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1174.

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*See also note, *supra*, p. 961.

No. 76–6880. KEETON ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 804.

No. 77–8. MEHTA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1169.

No. 77–57. GERMAIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 F. 2d 868.

No. 77–137. ELLISON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 557 F. 2d 128.

No. 77–139. MORGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 554 F. 2d 31.

No. 77–167. WATTS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–195. TARASI ET AL. *v.* PITTSBURGH NATIONAL BANK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 555 F. 2d 1152.

No. 77–201. PRICE *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 926.

No. 77–203. IRONS *v.* PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 37, 548 F. 2d 992.

No. 77–248. GLOVER *v.* HERALD CO., DBA GLOBE-DEMOCRAT PUBLISHING CO. Sup. Ct. Mo. Certiorari denied. Reported below: 549 S. W. 2d 858.

No. 77–266. BETHLEHEM STEEL CORP. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (TITUS, A MINOR, BY CUTHBERT, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 77–269. MCCALL ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 550 S. W. 2d 707.

No. 77–309. McDONNELL DOUGLAS CORP. *v.* HOUGHTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 561.

No. 77–316. KARNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1222.

No. 77–343. CISTERNINO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 1088.

No. 77–352. PLESONS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 890.

No. 77–372. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–390. CERILLI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 558 F. 2d 697.

No. 77–391. BURGETT ET UX. *v.* FEDERAL LAND BANK OF WICHITA. Sup. Ct. N. M. Certiorari denied.

No. 77–392. SWEENEY INDEPENDENT SCHOOL DISTRICT ET AL. *v.* HARKLESS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1353.

No. 77–393. FADELL *v.* MINNEAPOLIS STAR & TRIBUNE CO., INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 557 F. 2d 107.

No. 77–399. McDONALD *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 557 F. 2d 596.

No. 77–400. WOODROW *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 557 F. 2d 13.

No. 77–408. INGALLS SHIPBUILDING CORP., DIVISION OF LITTON SYSTEMS, INC. *v.* MORGAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 61.

No. 77–418. CALHOUN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 557 F. 2d 401.

No. 77–435. SWANSON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 16 Wash. App. 179, 554 P. 2d 364.

No. 77–438. BOLDRIDGE ET UX. *v.* ESTATE OF KEIMIG. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 280, 564 P. 2d 497.

No. 77–439. EKMANIAN ET AL. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 562 F. 2d 55.

No. 77–445. KENNY ET AL., EXECUTORS *v.* SANFILIPPO ET AL.; and

No. 77–451. SANFILIPPO ET AL. *v.* KENNY ET AL., EXECUTORS. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1208.

No. 77–468. GOOCH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–472. BUR *v.* BREIER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1034.

No. 77–482. CONKLIN ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–492. GREENBERG *v.* BURMAH OIL CO., LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 558 F. 2d 43.

No. 77–494. GEMEINDE BRAU, INC., ET AL. *v.* AMANA SOCIETY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 2d 638.

No. 77–496. CARGILE ET AL. *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 400 Mich. 527, 255 N. W. 2d 603.

No. 77–499. BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL. *v.* KIRKSEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 139.

No. 77–506. PETERS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 77–509. ROSANSKY *v.* LADENBURG, THALMANN & CO., INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 77–513. LOS ALAMOS SCHOOL BOARD *v.* WUGALTER, CHIEF, PUBLIC SCHOOL FINANCE DIVISION, DEPARTMENT OF FINANCE AND ADMINISTRATION OF NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 557 F. 2d 709.

No. 77–516. ZOLA *v.* CITY OF WAVERLY. Ct. App. Ohio, Pike County. Certiorari denied.

No. 77–519. NEWCOMB *v.* BRENNAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 825.

No. 77–520. KING *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 349 So. 2d 620.

No. 77–523. WILSON, ADMINISTRATRIX *v.* CROUSE-HINDS CO. C. A. 8th Cir. Certiorari denied. Reported below: 556 F. 2d 870.

No. 77–530. UNITED STATES *v.* ASHLAND OIL, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 554 F. 2d 381.

No. 77–535. GOSS *v.* REVLON, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 556.

No. 77–536. WINTERS *v.* MILLER, COMMISSIONER OF MENTAL HYGIENE OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 40.

No. 77–552. WHEELING-PITTSBURGH STEEL CORP. *v.* DEPARTMENT OF ENVIRONMENTAL RESOURCES OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 473 Pa. 432, 375 A. 2d 320.

No. 77–553. RINALDI *v.* HOLT, RINEHART & WINSTON, INC., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 369, 366 N. E. 2d 1299.

No. 77–556. EAST END YACHT CLUB, INC. *v.* BUCKLEY BROS. C. A. 2d Cir. Certiorari denied.

No. 77–558. GREVAS *v.* THE OLYMPIC PEGASUS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 557 F. 2d 65.

No. 77–559. LANE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–563. MOON ET AL. *v.* WEEKS. Ct. Sp. App. Md. Certiorari denied.

No. 77–566. HOWIE *v.* UNITED STATES RUBBER CO., INC., ET AL. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 343 So. 2d 52.

No. 77–573. CLARK ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 420.

No. 77–591. LOSING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 906.

No. 77–604. A. J. WHITE & CO. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 1st Cir. Certiorari denied. Reported below: 556 F. 2d 619.

No. 77–5044. MEADOWS *v.* EVANS, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 345.

No. 77–5104. FLORES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 561.

No. 77–5106. GRAVES, AKA BROWN *v.* POWERS, JUDGE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 572.

No. 77–5107. SCOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1064.

No. 77–5115. GAMBLE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5116. STOVALL *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 77–5128. BARTLETT *v.* DOWNTOWN TOLEDO ASSOCIATES, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 77–5141. EMRISKO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209 and 1210.

No. 77–5164. SNOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 552 F. 2d 165.

No. 77–5171. KINCADE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 906.

No. 77–5212. HUTTON *v.* UNITED STATES; and
No. 77–5225. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 558 F. 2d 1265.

No. 77–5243. DOWD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 472 Pa. 296, 372 A. 2d 705.

No. 77–5258. KOPEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 1265.

No. 77–5266. WILKERSON, AKA JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–5267. GREENE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 1029.

No. 77–5286. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1209.

No. 77–5294. CHAPMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 49.

No. 77–5299. LINZY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 45 Ill. App. 3d 612, 359 N. E. 2d 1230.

No. 77–5300. PARKER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 77–5301. CASTILE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–5306. MULLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1375.

No. 77–5336. ROBINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5342. PILLA *v.* ALEXANDER, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 509.

No. 77–5380. KEARNEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 560 F. 2d 1358.

No. 77–5381. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–5393. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 2d 1239.

No. 77–5396. CARVIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1303.

No. 77–5410. FOLKES *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 565 P. 2d 1125.

No. 77–5433. SMOLAR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 557 F. 2d 13.

No. 77–5470. KEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 561 F. 2d 8.

No. 77–5475. KNIGHT *v.* HANDWRITING EXEMPLARS. C. A. 3d Cir. Certiorari denied. Reported below: 559 F. 2d 1208.

No. 77–5501. CARTER *v.* DE GRAZIA ET AL. C. A. 1st Cir. Certiorari denied.

No. 77–5507. MASON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 558 F. 2d 133.

No. 77–5510. GUERRERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5512. MURPHY *v.* FATZER, CHIEF JUSTICE, SUPREME COURT OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–5513. PETRAUSKAS *v.* KIPNIS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 77–5518. GREEN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5520. BAUHAUS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 532 P. 2d 434.

No. 77–5526. MORRIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 266 Ind. 473, 364 N. E. 2d 132.

No. 77–5533. KURZ ET UX. *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 172.

No. 77–5534. ARZATE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 550 S. W. 2d 706.

No. 77–5535. KNIGHTEN *v.* BRODERICK. Sup. Ct. Miss. Certiorari denied. Reported below: 347 So. 2d 362.

No. 77–5542. ZILKA *v.* WALKER ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–5546. HENDERSON *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 77–5550. HAYTON *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 555 F. 2d 599.

No. 77–5552. ROBINSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 266 Ind. 604, 365 N. E. 2d 1218.

No. 77–5558. WEST *v.* SMITH. C. A. 2d Cir. Certiorari denied.

No. 77–5559. DE SWOLKIEN *v.* MCKENNA ET AL. Sup. Ct. N. J. Certiorari denied.

No. 77–5564. POSTON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 77–5565. GALBRAITH *v.* CITY OF COLUMBUS, OHIO. C. A. 6th Cir. Certiorari denied.

No. 77–5567. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 559 F. 2d 552.

No. 77–5569. MONACO ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1224.

No. 77–5573. RAINES *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 660.

No. 77–5578. CARLSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 561 F. 2d 105.

No. 77–5585. DYAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 376 A. 2d 827.

No. 77–5586. HARRELL *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 77–5588. PRICE *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 77–5596. TRAMBLE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 116 Ariz. 249, 568 P. 2d 1147.

No. 77–5597. COGNATO *v.* CICCONE, MEDICAL CENTER DIRECTOR. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 512.

No. 77–5603. GAMBLE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 653.

No. 77–5606. YORK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 53.

No. 77–5609. BEAR RIBS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 563.

No. 77–5611. MANDUCHI *v.* SCHLAGER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–5618. BALOUN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5630. FOSTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 564 F. 2d 620.

No. 77–5632. HAYNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 913.

No. 77–5635. LLAMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5636. AVALOS-OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 557 F. 2d 1299.

No. 77–5638. WEST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5661. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–256. TIGER INTERNATIONAL, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 554 F. 2d 926.

No. 77–501. STERN *v.* UNITED STATES GYPSUM, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 547 F. 2d 1329.

No. 77–531. UNION CAMP CORP. *v.* SEABOARD COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.* Reported below: 554 F. 2d 1299.

No. 77–5439. HOUSE *v.* STYNCHCOMBE, SHERIFF, ET AL. Sup. Ct. Ga.;

No. 77–5450. CEJA *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 77–5482. MCCORQUODALE *v.* STYNCHCOMBE, SHERIFF, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: No. 77–5439, 239 Ga. 222, 236 S. E. 2d 353; No. 77–5450, 115 Ariz. 413, 565 P. 2d 1274; No. 77–5482, 239 Ga. 138, 236 S. E. 2d 486.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

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*See also note, *supra*, p. 961.

No. 77–5612. HAWKINS-EL ET AL. *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Application for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 558 F. 2d 1029.

Rehearing Denied

No. 76–1418. COUNTY BOARD OF ARLINGTON COUNTY ET AL. *v.* RICHARDS ET AL., *ante*, p. 5;

No. 76–1440. GOLDSTEIN *v.* UNITED STATES, *ante*, p. 902;

No. 76–1547. SLOAN ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL., *ante*, p. 821;

No. 76–1578. VISCONTI *v.* UNITED STATES, *ante*, p. 822;

No. 76–1599. PRYOR *v.* UNITED STATES, *ante*, p. 824;

No. 76–1654. BROWNSELL ET UX. *v.* DAVIDSON ET AL., *ante*, p. 826;

No. 76–1670. PERRY *v.* UNITED STATES, *ante*, p. 827;

No. 76–1811. TRACY *v.* OHIO, *ante*, p. 805;

No. 76–1824. JACKSON *v.* STONE & SIMONS ADVERTISING, INC., ET AL., *ante*, p. 806;

No. 76–1845. EX PARTE MOODY, *ante*, p. 835;

No. 76–6261. RANSOM *v.* UNITED STATES, *ante*, p. 908;

No. 76–6697. VISCONTI *v.* UNITED STATES, *ante*, p. 822;

No. 76–6720. RICHMOND *v.* ARIZONA, 433 U. S. 915;

No. 76–6756. CHENAULT *v.* STYNCHCOMBE, SHERIFF, *ante*, p. 878;

No. 76–6975. MCDOWELL *v.* MORRIS, *ante*, p. 853;

No. 77–19. IN RE BOSTON & PROVIDENCE RAILROAD CORP., *ante*, p. 855;

No. 77–31. KING *v.* UNITED STATES, *ante*, p. 855;

No. 77–38. TIMMONS *v.* LAWTON ET AL., *ante*, p. 813;

No. 77–49. HOLM *v.* UNITED STATES, *ante*, p. 856; and

No. 77–71. DINEEN ET AL. *v.* BILANDIC, *ante*, p. 856. Petitions for rehearing denied.

No. 77–138. WEINBERGER *v.* DEPARTMENT OF COMMERCE OF FLORIDA; WEINBERGER *v.* TROMBETTA ET AL.; and WEINBERGER *v.* UNITED STATES, *ante*, p. 891;

No. 77–212. ROGERS *v.* CHILIVIS, COMMISSIONER OF REVENUE OF GEORGIA, *ante*, p. 891;

No. 77–221. PHILLIPS PETROLEUM CO. *v.* ASHLAND OIL, INC., ET AL., *ante*, p. 921;

No. 77–5021. COLLINS *v.* ARKANSAS, *ante*, p. 878;

No. 77–5058. GREENE *v.* UNITED STATES, *ante*, p. 864;

No. 77–5066. MORGAN *v.* TENNESSEE, *ante*, p. 905;

No. 77–5083. ADAMS *v.* FLORIDA, *ante*, p. 878;

No. 77–5145. ROYAL *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL., *ante*, p. 883;

No. 77–5170. NASIM *v.* MARYLAND, *ante*, p. 868;

No. 77–5192. BENNETT *v.* DIRECTOR OF INTERNAL REVENUE FOR NORTH CAROLINA ET AL., *ante*, p. 893;

No. 77–5213. FAHRIG *v.* JENEFSKY, *ante*, p. 870;

No. 77–5227. HENDERSON *v.* METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, *ante*, p. 870;

No. 77–5253. WALLACE *v.* PAN AMERICAN AIRWAYS, *ante*, p. 871;

No. 77–5298. SEVERA *v.* UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF PENNSYLVANIA, *ante*, p. 894; and

No. 77–5457. WISE *v.* UNITED STATES, *ante*, p. 929. Petitions for rehearing denied.

No. 77–118. PACIFIC ENGINEERING & PRODUCTION COMPANY OF NEVADA *v.* KERR-MCGEE CORP. ET AL., *ante*, p. 879. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.*

No. 77–5246. WATSON *v.* UNITED STATES, *ante*, p. 927. Motion to reject respondent's lodging and petition for rehearing denied.

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*See also note, *supra*, p. 961.

NOVEMBER 29, 1977

Dismissal Under Rule 60

No. 77–623. REGENTS OF THE UNIVERSITY OF MINNESOTA ET AL. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 560 F. 2d 352.

DECEMBER 5, 1977*

Orders Appointing Director and Deputy Director of Administrative Office of U. S. Courts

It is ordered that William E. Foley be appointed Director and that Joseph F. Spaniol be appointed Deputy Director of the Administrative Office of the United States Courts, effective November 21, 1977, pursuant to the provisions of § 601 of Title 28 United States Code.

Affirmed on Appeal

No. 77–5321. GRIMES *v.* MILLER ET AL. Affirmed on appeal from D. C. M. D. N. C. Reported below: 429 F. Supp. 1350.

Appeal Dismissed

No. 76–1847. SHELBY COUNTY, TENNESSEE, ET AL. *v.* PEEL. Appeal from Ct. App. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 76–1243. UNITED STATES *v.* SMITH ET UX. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Commissioner of Internal Revenue* v. *Kowalski*, *ante*, p. 77. Reported below: 543 F. 2d 1155.

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*MR. JUSTICE BLACKMUN took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of No. 76–1200, *Crist, Warden, et al.* v. *Cline et al.*, *infra*, p. 980.

Certiorari Granted—Reversed and Remanded. (See No. 76–1830, *ante*, p. 106.)

Certiorari Granted—Reversed. (See No. 76–1291, *ante*, p. 100.)

Miscellaneous Orders

No. A–453. BRISCOE, GOVERNOR OF TEXAS, ET AL. *v.* ESCALANTE ET AL. Application for stay of mandate of the United States District Court for the Western District of Texas, entered November 10, 1977, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted pending timely filing and disposition of an appeal in this Court.

No. D–65. IN RE DISBARMENT OF GALLANT. Disbarment entered. [For earlier order, see 429 U. S. 914.]

No. D–104. IN RE DISBARMENT OF MURRAY. Disbarment entered. [For earlier order, see 431 U. S. 902.]

No. D–122. IN RE DISBARMENT OF STILLO. It is ordered that Joseph E. Stillo of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–123. IN RE DISBARMENT OF CHVOSTA. It is ordered that Jerry F. Chvosta of North Randall, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–124. IN RE DISBARMENT OF LINDSAY. It is ordered that George G. Lindsay, of Pottsville, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–125. IN RE DISBARMENT OF DUDEN. It is ordered that Frederick D. Duden, Jr., of Wynnewood, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–126. IN RE DISBARMENT OF SPAR. It is ordered that Charles Spar, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–127. IN RE DISBARMENT OF GONZALEZ. It is ordered that Maximino Gonzalez of Bronx, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–128. IN RE DISBARMENT OF KELLOGG. It is ordered that Jack L. Kellogg, of Plainsboro, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–129. IN RE DISBARMENT OF FITZPATRICK. It is ordered that Robert L. Fitzpatrick, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 76–1200. CRIST, WARDEN, ET AL. *v.* CLINE ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 430 U. S. 982.] Case restored to calendar for reargument. Counsel requested to brief and discuss during oral argument the following questions:

1. Is the rule heretofore applied in the federal courts—that jeopardy attaches in jury trials when the jury is sworn—constitutionally mandated?

2. Should this Court hold that the Constitution does not require jeopardy to attach in any trial—state or federal, jury or nonjury—until the first witness is sworn?

The Solicitor General is invited to file a brief expressing the views of the United States on each of these questions.

MR. JUSTICE MARSHALL, dissenting.

By its order restoring this case to the calendar for rebriefing and additional oral argument, the Court appears once again to be "reach[ing] out" for a vehicle to change a long line of precedent. See *Pennsylvania* v. *Mimms*, *ante*, at 117 (STEVENS, J., dissenting). The Court asks the parties to discuss the rule to be applied in the federal courts with regard to attachment of jeopardy, a rule that is very well established.[1] But the parties here are Montana prison officials, represented by the Attorney General of Montana, and state-court defendants; they can hardly be considered knowledgeable about the federal courts. The Court attempts to surmount this difficulty by inviting the Solicitor General to provide the federal prosecutor's perspective on this important issue, yet it does not invite the other side, federal defendants or a representative of them, to submit a brief providing the opposing perspective.

In my view, the Court today does violence to two assumptions underlying Art. III of the Constitution: that we will

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[1] The current federal rule on attachment of jeopardy was applied in the federal courts as early as 1868. *United States* v. *Watson*, 28 F. Cas. 499 (No. 16,651) (SDNY). Since *Downum* v. *United States*, 372 U. S. 734 (1963), it has never been questioned in this Court that jeopardy attaches when the jury is sworn. See, *e. g.*, *Illinois* v. *Somerville*, 410 U. S. 458, 467 (1973); *id.*, at 471 (WHITE, J., dissenting); *Serfass* v. *United States*, 420 U. S. 377, 388 (1975); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569 (1977).

not anticipate a question before it is necessary to decide it,[2] and that both sides of an issue will be vigorously represented by involved advocates.[3] See generally *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). I dissent from the order restoring the case for reargument.

No. 76–1484. ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. *v.* STANFORD DAILY ET AL.; and

No. 76–1600. BERGNA, DISTRICT ATTORNEY OF SANTA CLARA COUNTY, ET AL. *v.* STANFORD DAILY ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 816.] Motion of petitioners for additional time for oral argument denied. Alternative request for divided argument granted.

No. 76–1608. MICHIGAN *v.* TYLER ET AL. Sup. Ct. Mich. [Certiorari granted, *ante*, p. 814.] Motion of L. Brooks Patterson, Esquire, to permit Jeffrey Butler, Esquire, to present oral argument *pro hac vice* on behalf of petitioner granted.

No. 76–1660. HUTTO ET AL. *v.* FINNEY ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 901.] Motion of petitioners to dispense with printing appendix granted.

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[2] The problems involved in anticipating a question are illustrated by the form of the Court's order. The Court asks about only two possibilities—when the jury is sworn or when the first witness is sworn—along a continuum of moments in a trial when jeopardy might be thought to attach. If tradition in this area is to be abandoned, there is no reason to limit the parties to these two quite arbitrary points of discussion. Cf. *Williams* v. *Florida*, 399 U. S. 78, 125–126 (1970) (Harlan, J., concurring and dissenting) (arbitrariness as reason for "not hoisting the anchor to history"). At least one commentator has argued that attaching jeopardy when the jury is sworn is too late, not too early, and that jeopardy should attach at the opening of *voir dire*. Schulhofer, Jeopardy and Mistrials, 125 U. Pa. L. Rev. 449, 512–514 (1977).

[3] It is particularly surprising that the Court grants oral argument to the state parties here, in view of the fact that rebriefing only—and not additional oral argument—was ordered earlier this Term in *Regents of University of California* v. *Bakke*, No. 76–811. I cannot believe that the Court views the instant case as raising more momentous issues than those raised in *Bakke*.

No. 76–1650. OHRALIK *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio; and

No. 77–56. IN RE SMITH. Sup. Ct. S. C. [Probable jurisdiction noted, *ante*, p. 814.] Motion of Public Citizen et al. for leave to file a brief as *amici curiae* granted.

No. 77–25. FLAGG BROS., INC., ET AL. *v.* BROOKS ET AL.;

No. 77–37. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK *v.* BROOKS ET AL.; and

No. 77–42. AMERICAN WAREHOUSEMEN'S ASSN. ET AL. *v.* BROOKS ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 817.] Motion of petitioners for additional time for oral argument denied. Alternative request for divided argument granted.

No. 77–5713. MAYFIELD *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 77–5608. NORMAN *v.* McGOVERN, CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 77–293. KULKO *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO (HORN, REAL PARTY IN INTEREST). Appeal from Sup. Ct. Cal. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 19 Cal. 3d 514, 564 P. 2d 353.

No. 77–444. PENN CENTRAL TRANSPORTATION CO. ET AL. *v.* NEW YORK CITY ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 42 N. Y. 2d 324, 366 N. E. 2d 1271.

Certiorari Granted

No. 77–178. ROBERTSON *v.* WEGMANN, EXECUTOR, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 545 F. 2d 980.

No. 77–285. CALIFORNIA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 558 F. 2d 1347.

No. 77–560. GARDNER *v.* WESTINGHOUSE BROADCASTING CO. C. A. 3d Cir. Certiorari granted and case set for oral argument together with No. 76–1836, *Coopers & Lybrand* v. *Livesay*, and No. 76–1837, *Punta Gorda Isles, Inc.* v. *Livesay* [certiorari granted, *ante*, p. 954.] Reported below: 559 F. 2d 209.

Certiorari Denied. (See also No. 76–1847, *supra*.)

No. 76–1403. HUNT ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.* Reported below: 550 F. 2d 68.

No. 76–1539. KOERNER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 2d 1362.

No. 76–6852. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–166. SCHEPICI ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 560 F. 2d 448.

No. 77–303. THOMAS J. PALMER, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES (CROCKER NATIONAL BANK, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 68 Cal. App. 3d 863, 136 Cal. Rptr. 481.

No. 77–312. BARBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 558 F. 2d 1271.

No. 77–413. KLEIN *v.* ASTLER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1063.

No. 77–427. KOONTZ *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 762, 566 F. 2d 1188.

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*See also note, *supra*, p. 978.

No. 77–430. OGLETREE ET AL. *v.* UNITED STATES; and
No. 77–432. SCOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 522.

No. 77–443. JOSEPH SKILKEN & CO. ET AL. *v.* CITY OF TOLEDO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 558 F. 2d 350.

No. 77–446. TENNESSEE VALLEY AUTHORITY ET AL. *v.* EASTLAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 364.

No. 77–544. BLUE CROSS OF WESTERN PENNSYLVANIA *v.* MARSH, U. S. DISTRICT JUDGE (COLES, REAL PARTY IN INTEREST). C. A. 3d Cir. Certiorari denied. Reported below: 560 F. 2d 186.

No. 77–554. GLOBE LININGS, INC., ET AL. *v.* CITY OF CORVALLIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 555 F. 2d 727.

No. 77–569. ZURN ENGINEERS *v.* CALIFORNIA EX REL. DEPARTMENT OF WATER RESOURCES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 69 Cal. App. 3d 798, 138 Cal. Rptr. 478.

No. 77–571. MOODY *v.* TEXAS. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 539 S. W. 2d 354.

No. 77–579. MARTIN ET UX. *v.* GIRARD TRUST BANK. C. A. 3d Cir. Certiorari denied. Reported below: 557 F. 2d 386.

No. 77–586. MCCARTHY ET AL. *v.* BRISCOE, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 1005.

No. 77–590. TIMMONS *v.* MCGRATH. Sup. Ct. S. C. Certiorari denied.

No. 77–634. SEMCO MANUFACTURING, INC. *v.* U. S. INDUSTRIES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 1061.

No. 77–5059. DUPREE *v.* UNITED STATES C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 1189.

No. 77–5146. POULACK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 556 F. 2d 83.

No. 77–5149. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 560 F. 2d 148.

No. 77–5198. HARMER *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 77–5210. MEDICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 557 F. 2d 309.

No. 77–5228. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 1177.

No. 77–5295. KENNARD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5296. STANARD *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 74, 365 N. E. 2d 857.

No. 77–5338. MUIR *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 67 Ill. 2d 86, 365 N. E. 2d 332.

No. 77–5356. SAYLOR *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–5357. BOTTOS *v.* AVAKIAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1225.

No. 77–5372. PAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1220.

No. 77–5404. STANFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 77–5441. GOMEZ *v.* UNITED STATES; and
No. 77–5474. BREZALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5458. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 934.

No. 77–5467. TOWNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–5489. MOORE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 421, 366 N. E. 2d 1330.

No. 77–5497. KLEIN *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 189.

No. 77–5572. LITTLEFIELD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 554 S. W. 2d 872.

No. 77–5574. STODDARD *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 77–5575. HEYMAN *v.* TRUST FUND SERVICES, INC. Sup. Ct. Wash. Certiorari denied. Reported below: 88 Wash. 2d 698, 565 P. 2d 805.

No. 77–5581. LEWIS *v.* GOURLEY, CORRECTIONS DIRECTOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 393.

No. 77–5595. DONNELLY *v.* BOSTON COLLEGE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 558 F. 2d 634.

No. 77–5605. BRAUDRICK *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 77–5607. WARD *v.* KENTUCKY STATE UNIVERSITY BOARD OF REGENTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 77–5610. CONDLEY ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 69 Cal. App. 3d 999, 138 Cal. Rptr. 515.

No. 77–5616. HINES *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 77–5625. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 572.

No. 77–5662. LOE *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 1029.

No. 77–311. ILLINOIS *v.* GARLICK. App. Ct. Ill., 5th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that the judgment below rests upon adequate state grounds. Reported below: 46 Ill. App. 3d 216, 360 N. E. 2d 1121.

Rehearing Denied

No. 76–1724. FEDERAL COMMUNICATIONS COMMISSION *v.* HOME BOX OFFICE, INC., ET AL., *ante*, p. 829;

No. 77–325. NASHVILLE GAS CO. *v.* TENNESSEE PUBLIC SERVICE COMMISSION ET AL., *ante*, p. 904;

No. 77–355. BERNSTEIN *v.* FLORIDA ET AL.; and BROPHY *v.* NEW HAMPSHIRE ET AL., *ante*, p. 904;

No. 77–373. ERNEST *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, *ante*, p. 901;

No. 77–5057. JACKSON *v.* JAGO, CORRECTIONAL SUPERINTENDENT, *ante*, p. 940;

No. 77–5065. EVERS *v.* UNITED STATES, *ante*, p. 926; and

No. 77–5257. RUST *v.* NEBRASKA; and HOLTAN *v.* NEBRASKA, *ante*, p. 912. Petitions for rehearing denied.

No. 75–881. HOOBAN *v.* BOARD OF GOVERNORS, WASHINGTON STATE BAR ASSN., 424 U. S. 902. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied.

No. 76–545. UNITED AIRLINES, INC. *v.* MCDONALD, 432 U. S. 385. Petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.*

No. 76–1639. RAMSEY *v.* THE MODOC ET AL., *ante*, p. 826. Motion for leave to file petition for rehearing denied.

DECEMBER 12, 1977†

Appeals Dismissed

No. 77–132. HILL *v.* GARNER. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 277 Ore. 641, 561 P. 2d 1016.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

The issue presented by this appeal from the Oregon Supreme Court is whether Oregon's guest-passenger statute, Ore. Rev. Stat. § 30.115 (1975),[1] violates either the Equal

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*See also note, *supra*, p. 978.

†MR. JUSTICE BLACKMUN took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 77–132, *infra*, this page; No. 77–211, *infra*, p. 1000; No. 77–249, *infra*, p. 1001; No. 77–365, *infra*, p. 996; No. 77–369, *infra*, p. 996; No. 77–503, *infra*, p. 1001; No. 77–534, *infra*, p. 1002; and No. 77–568, *infra*, p. 1002.

[1] Section 30.115 reads as follows:

"No person transported by the owner or operator of a motor vehicle, an aircraft, a watercraft, or other means of conveyance, as his guest without payment for such transportation, shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication. As used in this section:

"(1) 'Payment' means a substantial benefit in a material or business sense conferred upon the owner or operator of the conveyance and which

Protection or Due Process Clause of the Fourteenth Amendment. The statute, which prevents a nonpaying passenger from recovering against the owner or operator of a vehicle except in those situations in which the passenger's injury is the result of an intentional or grossly negligent act on the part of the owner or operator, was upheld by the Oregon court on the basis of its earlier decisions sustaining the statute's constitutionality. See *Duerst* v. *Limbocker*, 269 Ore. 252, 525 P. 2d 99 (1974); *Salmon* v. *Miller*, 269 Ore. 267, 525 P. 2d 104 (1974); *Jenson* v. *Spencer*, 269 Ore. 411, 525 P. 2d 153 (1974).

In 1929 this Court held that Connecticut's guest statute did not violate the Equal Protection Clause, because it could not be said that "no grounds exist[ed] for the distinction" between gratuitous passengers in automobiles and those in other classes of vehicles. *Silver* v. *Silver*, 280 U. S. 117, 123 (1929). While that decision for a while foreclosed federal equal protection challenges to the guest statutes of the various States, in recent years the issue of the constitutional validity of these statutes has been frequently litigated in state courts with conflicting results. Since 1971 the highest courts of no fewer than 6 States have concluded that their guest statutes violated the Equal Protection Clause of the Fourteenth Amendment,[2] while during the same period similar statutes

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is a substantial motivating factor for the transportation, and it does not include a mere gratuity or social amenity.

"(2) 'Gross negligence' refers to negligence which is materially greater than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others."

[2] In the following cases guest statutes were declared invalid on federal constitutional grounds: *McGeehan* v. *Bunch*, 88 N. M. 308, 540 P. 2d 238 (1975); *Laakonen* v. *Eighth Judicial District Court*, 91 Nev. 506, 538 P. 2d 574 (1975); *Primes* v. *Tyler*, 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975); *Thompson* v. *Hagan*, 96 Idaho 19, 523 P. 2d 1365 (1974); *Henry* v. *Bauder*, 213 Kan. 751, 518 P. 2d 362 (1974); *Brown* v. *Merlo*, 8 Cal. 3d 855, 506 P. 2d 212 (1973). In each of these cases, the statute was also invalidated on state constitutional grounds, but it is apparent

have been upheld against federal constitutional attack in 10 States.[3] Typical of those decisions striking down the guest statutes is *Brown* v. *Merlo*, 8 Cal. 3d 855, 506 P. 2d 212 (1973), in which the California Supreme Court concluded that the classifications created by the challenged statute between those denied and those permitted recovery for negligently inflicted injuries did not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and of preventing collusive lawsuits. *Silver* v. *Silver* was expressly distinguished as involving different equal protection considerations. In contrast, the Oregon Supreme Court, among others, has held that the hospitality rationale does support the distinctions drawn by the State's guest statute. *Duerst* v. *Limbocker, supra.*

As could be expected from the frequency of the consideration of this question by the state courts and from the contradictory results, the issue has been presented here several

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that various equal protection cases in this Court, such as *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *Reed* v. *Reed*, 404 U. S. 71 (1971); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U. S. 73 (1968), were read as requiring a different federal constitutional result from that announced in *Silver* v. *Silver* and were influential factors in arriving at the state-law conclusion.

Additionally, in two cases guest statutes were invalidated on state constitutional grounds: *Manistee Bank & Trust Co.* v. *McGowan*, 394 Mich. 655, 232 N. W. 2d 636 (1975); *Johnson* v. *Hassett*, 217 N. W. 2d 771 (N. D. 1974).

[3] In the following cases guest statutes were upheld: *Sidle* v. *Majors*, 536 F. 2d 1156 (CA7), cert. denied, 429 U. S. 945 (1976); *Behrns* v. *Burke*, 89 S. D. 96, 229 N. W. 2d 86 (1975); *White* v. *Hughes*, 257 Ark. 627, 519 S. W. 2d 70, appeal dismissed for want of substantial federal question, 423 U. S. 805 (1975); *Richardson* v. *Hansen*, 186 Colo. 346, 527 P. 2d 536 (1974); *Duerst* v. *Limbocker*, 269 Ore. 252, 525 P. 2d 99 (1974); *Cannon* v. *Oviatt*, 520 P. 2d 883 (Utah), appeal dismissed for want of substantial federal question, 419 U. S. 810 (1974); *Keasling* v. *Thompson*, 217 N. W. 2d 687 (Iowa 1974); *Justice* v. *Gatchell*, 325 A. 2d 97 (Del. 1974); *Tisko* v. *Harrison*, 500 S. W. 2d 565 (Tex. Civ. App. 1973); *Delany* v. *Badame*, 49 Ill. 2d 168, 274 N. E. 2d 353 (1971).

times in recent years. In each of the last three Terms, we have been asked to consider whether a state or federal court had correctly determined that a state guest statute did not violate the Equal Protection Clause, and on each occasion we declined to grant plenary consideration of the question. *Sidle* v. *Majors*, 536 F. 2d 1156 (CA7), cert. denied, 429 U. S. 945 (1976); *White* v. *Hughes*, 257 Ark. 627, 519 S. W. 2d 70, appeal dismissed for want of substantial federal question, 423 U. S. 805 (1975); *Cannon* v. *Oviatt*, 520 P. 2d 883 (Utah), appeal dismissed for want of substantial federal question, 419 U. S. 810 (1974).

It is significant that on two of these occasions the issue was presented here by means of appeal and that the constitutional grounds urged for invalidity were similar to those relied upon by those courts that have invalidated state guest statutes. We nevertheless dismissed in these two instances for want of a substantial federal question, thus ruling on the merits of the equal protection issue, *Hicks* v. *Miranda*, 422 U. S. 332 (1975), and rejecting the challenge to the statutes.

Such dismissals, however, may not serve their intended purpose, for on at least three occasions since our decision in *Cannon* v. *Oviatt*, *supra*, state courts have invalidated guest statutes on the same or very similar equal protection grounds found to be insubstantial in *Cannon*. Because the significant division among state courts persists despite *Silver* v. *Silver*, *supra*, and despite our more recent relevant dismissals, I would note probable jurisdiction and set this case for oral argument.

No. 77–578. BRIGGS *v.* NORTH CAROLINA. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 562 F. 2d 48.

No. 77–5329. STANDOW *v.* CITY OF SPOKANE. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 88 Wash. 2d 624, 564 P. 2d 1145.

Miscellaneous Orders

No. ———. BLANCHETTE ET AL., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION CO. ET AL. *v.* U. S. RAILWAY ASSN. ET AL. Sp. Ct. R. R. R. A. Appeals dismissed without prejudice, it appearing that the appeals would not be in the interest of an expeditious conclusion to the proceedings.* Reported below: 445 F. Supp. 994.

No. A–259 (O. T. 1976). HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* UNDERWOOD ET AL. D. C. D. C. Motion of respondents to vacate stay heretofore entered by the Court on October 18, 1976 [429 U. S. 892, *sub nom. Hills* v. *Underwood*], denied.

No. A–433 (76, Orig.). CALIFORNIA *v.* TEXAS. Application for temporary restraining order and preliminary injunction, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A-453. BRISCOE, GOVERNOR OF TEXAS, ET AL. *v.* ESCALANTE ET AL. D. C. W. D. Tex. Motion to reconsider stay granted by this Court on December 5, 1977 [*ante*, p. 979], and for other relief denied.

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*[REPORTER'S NOTE: In addition to the Penn Central Trustees, the following lodged notices of appeal with the Clerk of this Court: Intervening Penn Central Lienholders; Trustee of Certain Secondary Debtors; Trustee of the Pittsburgh, Fort Wayne & Chicago Railway Co.; Mahoning Coal Railroad Co. et al.; Indianapolis Union Railway Co. et al.; Central Indiana Railway Co. et al.; Trustee of the Ann Arbor Railroad Co.; Trustee of the Central Railroad Co. of New Jersey et al.; Trustee of the Lehigh Valley Railroad Co. et al.; Trustees of the Reading Co. et al.; Provident National Bank et al.; Penn Central Co.; Trustees of Erie Lackawanna Railway Co. et al.; Peoria & Eastern Railway Co.; Trustee of the Philadelphia, Baltimore & Washington Railroad Co. et al.; North Pennsylvania Railroad Co. et al.; Trustee of the Lehigh & Hudson River Railway Co.; Citibank, N. A.; Trustee of the New York, New Haven & Hartford Railroad Co.; and the Chicago, Kalamazoo & Saginaw Railway Co. et al.]

No. A–244. JONES *v.* UNITED STATES. C. A. 10th Cir. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. 76–419. VERMONT YANKEE NUCLEAR POWER CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 429 U. S. 1090.] Motion of respondents for leave to file a brief after argument granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.*

No. 76–709. BUTZ ET AL. *v.* ECONOMOU ET AL. C. A. 2d Cir. [Certiorari granted, 429 U. S. 1089.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 76–1471. FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1521. CHANNEL TWO TELEVISION CO. ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1595. NATIONAL ASSOCIATION OF BROADCASTERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 76–1604. AMERICAN NEWSPAPER PUBLISHERS ASSN. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1624. ILLINOIS BROADCASTING CO., INC., ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.; and

No. 76–1685. POST CO. ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General, on behalf of all private petitioners, the Federal Communications Commission, and respondents United States and National Citizens Committee, for additional time granted, and a total of one and one-half hours allotted for oral argument.

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*See also second note, *supra*, p. 989.

No. 76–1121. AMERICAN BROADCASTING COMPANIES, INC., ET AL. *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL.;

No. 76–1153. ASSOCIATION OF MOTION PICTURE & TELEVISION PRODUCERS, INC. *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL.; and

No. 76–1162. NATIONAL LABOR RELATIONS BOARD *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 430 U. S. 982.] These cases are restored to the calendar for reargument.

No. 77–10. EXXON CORP. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–11. SHELL OIL CO. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–12. CONTINENTAL OIL CO. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–47. GULF OIL CORP. *v.* GOVERNOR OF MARYLAND ET AL.; and

No. 77–64. ASHLAND OIL, INC., ET AL. *v.* GOVERNOR OF MARYLAND ET AL. Ct. App. Md. [Probable jurisdiction noted, *ante*, p. 814.] Motion of Charter Oil Co. et al. for leave to file a brief as *amici curiae* granted. Motion of Crown Central Petroleum Co. for leave to file a brief as *amicus curiae* in No. 77–10 granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.*

No. 77–747. ALLIED STRUCTURAL STEEL CO. *v.* SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL. Appeal from D. C. Minn. Motion of appellants to expedite consideration of appeal denied.

No. 77–5176. FRANKS *v.* DELAWARE. Sup. Ct. Del. [Certiorari granted, *ante*, p. 889.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

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*See also second note, *supra*, p. 989.

Certiorari Granted

No. 77–365. UNITED STATES ET AL. *v.* LASALLE NATIONAL BANK ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 554 F. 2d 302.

No. 77–369. FURNCO CONSTRUCTION CORP. *v.* WATERS ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 551 F. 2d 1085.

No. 77–567. NEW YORK STATE PAROLE BOARD ET AL. *v.* CORALLUZZO. C. A. 2d Cir. Certiorari granted. Reported below: 566 F. 2d 375.

Certiorari Denied. (See also No. 77–578, *supra.*)

No. 76–6268. SHIMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1026, and 560 F. 2d 1287.

No 76–6990. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 77–271. ST. REGIS PAPER CO. *v.* ROYAL INDUSTRIES ET AL.; and

No. 77–279. ROYAL INDUSTRIES ET AL. *v.* ST. REGIS PAPER CO. C. A. 9th Cir. Certiorari denied. Reported below: 552 F. 2d 309.

No. 77–344. HEYN *v.* LOUISIANA STATE UNIVERSITY, AGRICULTURAL AND MECHANICAL COLLEGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1282.

No. 77–428. MOODY *v.* PAYNE, COMMISSIONER OF INSURANCE. Sup. Ct. Ala. Certiorari denied. Reported below: 344 So. 2d 160.

No. 77–545. GENERAL GMC TRUCKS, INC. *v.* GENERAL MOTORS CORP. ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 239 Ga. 373, 237 S. E. 2d 194.

No. 77–562. EARLEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 33 N. C. App. 636, 235 S. E. 2d 798.

No. 77–585. INDIANA ET AL. *v.* CHOUDHRY. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 2d 1085.

No. 77–600. LANSING BOARD OF EDUCATION ET AL. *v.* NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1042.

No. 77–616. HOLLYWOOD, INC. *v.* CITY OF HOLLYWOOD. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 339 So. 2d 1190.

No. 77–625. LEWIS, AKA KENNEDY *v.* GREYHOUND LINES-EAST ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 116, 555 F. 2d 1053.

No. 77–676. THOMPSON *v.* BOARD OF ELECTIONS OF KENTON COUNTY ET AL. C. A. 6th Cir. Certiorari denied.

No. 77–692. ORSINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1206.

No. 77–5133. KRAUT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5173. HAWKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 49.

No. 77–5259. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 550 S. W. 2d 706.

No. 77–5261. DOYLE *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 474.

No. 77–5276. CAMPBELL *v.* UNITED STATES;
No. 77–5390. WILLIAMS *v.* UNITED STATES; and
No. 77–5399. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–5318. MINJARES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–5334. WRIGHT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 77–5369. PAPRSKAR *v.* WHITESIDE ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–5384. BELT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–5388. BROWN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 292 N. C. 494, 234 S. E. 2d 563.

No. 77–5424. SEARCY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1064.

No. 77–5445. TINOCO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 77–5490. PEEKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 563 F. 2d 569.

No. 77–5495. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 822.

No. 77–5543. RAITPORT *v.* CHEMICAL BANK ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–5562. NICHELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 530.

No. 77–5584. FORBES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 967.

No. 77–5614. FAIRCHILD *v.* MUNICIPAL COURT OF CALIFORNIA, IMPERIAL COUNTY, IMPERIAL JUDICIAL DISTRICT. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–5619. MASSEY *v.* GARNER, SHERIFF, ET AL. C. A. 8th Cir. Certiorari denied.

No. 77–5622. STOCKING *v.* MARSH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 309.

No. 77–5624. WARNER ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 568 P. 2d 1284.

No. 77–5627. DILLARD *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 873.

No. 77–5628. DIOQUINO *v.* FAIR EMPLOYMENT PRACTICE COMMISSION OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–5634. SPECK *v.* AUGER. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 394.

No. 77–5637. YOUNG *v.* CLANON, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No 77–5642. THOMPSON *v.* VERMILLION ET AL. C. A. 8th Cir. Certiorari denied.

No. 77–5649. EDWARDS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 554 S. W. 2d 380.

No. 77–5673. WHITESIDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 1039.

No. 77–5675. HARMER *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 101.

No. 77–5681. WATSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 154.

No. 77–5682. BROCKMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5683. CONDO *v.* SUN CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–5685. PLACE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 561 F. 2d 213.

No. 77–5689. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 561 F. 2d 830.

No. 77–5691. RAMIREZ-BETANCOURT, AKA BRAVO *v.* UNITED STATES; and

No. 77–5694. ARCHBOLD-NEWBALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 665.

No. 77–5697. KOSSEFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5699. KELLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 399.

No. 77–5714. ALLEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 377 A. 2d 65.

No. 77–5719. LYNCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 564 F. 2d 100.

No. 77–211. MARLER *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Diego. Certiorari denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the San Diego Municipal Court of selling obscene materials in violation of Cal. Penal Code Ann. § 311.2 (West 1970), and his conviction was affirmed in an unpublished decision by the Appellate Department of the San Diego County Superior Court. I would reverse the conviction. I adhere to my view expressed in *Miller* v. *California*, 413 U. S. 15 (1973), that this statute is "unconstitutionally overbroad, and therefore invalid on its face." *Id.*, at 47

(BRENNAN, J., dissenting). See also *Kuhns* v. *California*, 431 U. S. 973 (1977) (BRENNAN, J., dissenting); *Splawn* v. *California*, 431 U. S. 595, 601 (1977) (BRENNAN, J., dissenting); *Pendleton* v. *California*, 423 U. S. 1068 (1976) (BRENNAN, J., dissenting); *Sandquist* v. *California*, 423 U. S. 900, 901 (1975) (BRENNAN, J., dissenting); *Tobalina* v. *California*, 419 U. S. 926 (1974) (BRENNAN, J., dissenting); *Kaplan* v. *California*, 419 U. S. 915 (1974) (BRENNAN, J., dissenting); *Blank* v. *California*, 419 U. S. 913 (1974) (BRENNAN, J., dissenting).

No. 77–249. JOHANSEN *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Whittier Municipal Court of exhibiting obscene materials in violation of Cal. Penal Code Ann. § 311.2 (West 1970), and his conviction was affirmed in an unpublished decision by the Appellate Department of the Los Angeles County Superior Court. I would reverse the conviction. I adhere to my view expressed in *Miller* v. *California*, 413 U. S. 15 (1973), that this statute is "unconstitutionally overbroad, and therefore invalid on its face." *Id.*, at 47 (BRENNAN, J., dissenting). See also *Kuhns* v. *California*, 431 U. S. 973 (1977) (BRENNAN, J., dissenting); *Splawn* v. *California*, 431 U. S. 595, 601 (1977) (BRENNAN, J., dissenting); *Pendleton* v. *California*, 423 U. S. 1068 (1976) (BRENNAN, J., dissenting); *Sandquist* v. *California*, 423 U. S. 900, 901 (1975) (BRENNAN, J., dissenting); *Tobalina* v. *California*, 419 U. S. 926 (1974) (BRENNAN, J., dissenting); *Kaplan* v. *California*, 419 U. S. 915 (1974) (BRENNAN, J., dissenting); *Blank* v. *California*, 419 U. S. 913 (1974) (BRENNAN, J., dissenting).

No. 77–503. ESTELLE, CORRECTIONS DIRECTOR *v.* POTTS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 554 F. 2d 1063.

No. 77–568. MARYLAND *v.* KIDD. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 281 Md. 32, 375 A. 2d 1105.

No. 77–534. CHASE *v.* WALD ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 557 F. 2d 157.

No. 77–576. EDWARDS ET AL. *v.* NEW YORK TIMES CO. ET AL. C. A. 2d Cir. Motions of Accuracy in Media, Inc., and Pacific Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 556 F. 2d 113.

No. 77–5553. BROCK *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 77–5620. YOUNG *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 77–5553, 556 S. W. 2d 309; No. 77–5620, 239 Ga. 53, 236 S. E. 2d 1.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 76–1793. SANDERS *v.* KANSAS, *ante*, p. 833;

No. 76–6966. SILO *v.* KANE, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL., *ante*, p. 852;

No. 77–265. HIGGINBOTTOM *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, *ante*, p. 921;

No. 77–295. RAFFERTY ET AL. *v.* MARCIN, *ante*, p. 899;

No. 77–328. TRAFFICANTE *v.* UNITED STATES, *ante*, p. 922; and

No. 77–331. MILLS *v.* ELECTRIC AUTO-LITE CO. ET AL., *ante*, p. 922. Petitions for rehearing denied.

No. 77–5025. MORGAN *v.* UNITED STATES, *ante*, p. 925;

No. 77–5408. BANKS *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA ET AL., *ante*, p. 929; and

No. 77–5464. PRYOR *v.* GEORGIA, *ante*, p. 935. Petitions for rehearing denied.

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Appeals Dismissed

No. 77–397. SCOTT, DBA SLICK NICK'S *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 77–5375. BRANTLEY *v.* RICKETTS, WARDEN, ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 239 Ga. 151, 236 S. E. 2d 51.

No. 77–5492. HENRY ET AL. *v.* FLINT RIVER MILLS. Appeal from Sup. Ct. Ga. Appeal dismissed for want of substantial federal question. Reported below: 239 Ga. 347, 236 S. E. 2d 583.

No. 77–410. CITY OF PHILADELPHIA ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction. *MTM* v. *Baxley*, 420 U. S. 799 (1975). Reported below: 434 F. Supp. 281.

No. 77–644. WILD *v.* OTIS ET AL. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 257 N. W. 2d 361.

No. 77–5525. TORRES ET AL. *v.* RAMOS, SECRETARY OF NATURAL RESOURCES, ET AL. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Reported below: —— P. R. R. ——.

No. 77–5623. EDENS *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 562 F. 2d 46.

No. 77–5659. BAD HEART BULL ET AL. *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. Motion of appellants to dismiss information denied. Appeal dismissed for want of substantial federal question. Reported below: — S. D. —, 257 N. W. 2d 715.

Certiorari Granted—Reversed. (See No. 77–267, *ante*, p. 236.)

Miscellaneous Orders

No. A–545 (77–885). COMMISSIONER OF EDUCATION OF NEW JERSEY ET AL. *v.* BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL, TOWNSHIP OF FRANKLIN, ET AL. Sup. Ct. N. J. Application for stay, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–563. WESTERN UNION INTERNATIONAL, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Application for stay of mandate of the United States Court of Appeals for the Second Circuit and stay of orders and authorizations of the Federal Communications Commission, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Order heretofore entered by MR. JUSTICE MARSHALL on December 30, 1977, is vacated.

No. D–130. IN RE DISBARMENT OF SPURLARK. It is ordered that Royal E. Spurlark, Jr., of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–114. IN RE DISBARMENT OF CONSOLDANE. Disbarment entered. [For earlier order, see *ante*, p. 899.]

No. 76–1184. MALONE, COMMISSIONER OF LABOR AND INDUSTRY FOR MINNESOTA *v.* WHITE MOTOR CORP. ET AL. C. A. 8th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motions of Chamber of Commerce of the United States and American Federation of Labor and Congress of Industrial Organizations for leave to file briefs as *amici curiae* granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 76–1471. FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1521. CHANNEL TWO TELEVISION CO. ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1595. NATIONAL ASSOCIATION OF BROADCASTERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 76–1604. AMERICAN NEWSPAPER PUBLISHERS ASSN. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1624. ILLINOIS BROADCASTING CO., INC., ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.; and

No. 76–1685. POST CO. ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 815.] Motions of Office of Communication of the United Church of Christ et al. and National Emergency Civil Liberties Foundation for leave to file briefs as *amici curiae* granted.

No. 76–1484. ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. *v.* STANFORD DAILY ET AL.; and

No. 76–1600. BERGNA, DISTRICT ATTORNEY OF SANTA CLARA COUNTY, ET AL. *v.* STANFORD DAILY ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 816.] Motion of National Association of Criminal Defense Lawyers, Inc., for leave to participate in oral argument as *amicus curiae* denied.

No. 76–1650. OHRALIK *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio; and

No. 77–56. IN RE SMITH. Sup. Ct. S. C. [Probable jurisdiction noted, *ante*, p. 814.] Motion of Public Citizen et al. for leave to participate in oral argument as *amici curiae* denied.

No. 76–1726. MOBIL OIL CORP. *v.* HIGGINBOTHAM, ADMINISTRATRIX, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 816.] Motion of respondents for divided argument denied.

No. 76–1767. NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 815.] Motion of petitioner to compel the Solicitor General to file brief for the United States granted.

No. 76–1796. OTTOBONI ET AL. *v.* UNITED STATES, *ante*, p. 930. The Solicitor General is invited to file a response to motion for leave to file petition for rehearing within 30 days.

No. 77–10. EXXON CORP. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–11. SHELL OIL CO. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–12. CONTINENTAL OIL CO. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–47. GULF OIL CORP. *v.* GOVERNOR OF MARYLAND ET AL.; and

No. 77–64. ASHLAND OIL, INC., ET AL. *v.* GOVERNOR OF MARYLAND ET AL. Ct. App. Md. [Probable jurisdiction noted, *ante*, p. 814.] Motions of National Congress of Petroleum Retailers and Day Enterprises, Inc., et al. for leave to file briefs as *amici curiae* granted. Motion of Day Enterprises, Inc., et al. for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 76–1750. STUMP ET AL. *v.* SPARKMAN ET VIR. C. A. 7th Cir. [Certiorari granted, *ante*, p. 815.] Motions of American Coalition of Citizens with Disabilities et al., American Civil Liberties Union et al., and National Center for Law and the Handicapped, Inc., for leave to file briefs as *amici curiae* granted. Motion of petitioners for divided argument denied.

No. 77–25. FLAGG BROS., INC., ET AL. *v.* BROOKS ET AL.;
No. 77–37. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK *v.* BROOKS ET AL.; and
No. 77–42. AMERICAN WAREHOUSEMEN'S ASSN. ET AL. *v.* BROOKS ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 817.] Motions of New York State Consumer Protection Board and Legal Aid Society of New York City for leave to file briefs as *amici curiae* granted.

No. 77–653. SWISHER, STATE'S ATTORNEY FOR BALTIMORE CITY, ET AL. *v.* BRADY ET AL. D. C. Md. [Probable jurisdiction noted, *ante*, p. 963.] Motion of appellees for appointment of counsel granted, and it is ordered that Peter S. Smith, Esquire, of Baltimore, Md., be appointed to serve as counsel in this case.

No. 77–5582. RANDALL *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioner to consolidate with No. 76–1596, *United States* v. *Mauro* [certiorari granted, *ante*, p. 816], denied.

No. 77–615. KEYES ET UX. *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL.;
No. 77–5516. BEACHEM *v.* UNITED STATES ET AL.;
No. 77–5677. CORLEY *v.* JOHNSON, JUDGE; and
No. 77–5703. STACY *v.* KARL, ASSOCIATE JUSTICE, SUPREME COURT OF FLORIDA. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 77–528. FEDERAL COMMUNICATIONS COMMISSION *v.* PACIFICA FOUNDATION ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 181 U. S. App. D. C. 132, 556 F. 2d 9.

No. 77–677. OWEN EQUIPMENT & ERECTION CO. *v.* KROGER, ADMINISTRATRIX. C. A. 8th Cir. Certiorari granted. Reported below: 558 F. 2d 417.

No. 77–693. WILL, U. S. DISTRICT JUDGE *v.* CALVERT FIRE INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 560 F. 2d 792.

No. 77–510. UNITED STATES *v.* NEW MEXICO. Sup. Ct. N. M. Motion of National Wildlife Federation et al. for leave to file a brief as *amici curiae* and certiorari granted. Reported below: 90 N. M. 410, 564 P. 2d 615.

No. 77–529. WISE, MAYOR OF DALLAS, ET AL. *v.* LIPSCOMB ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 551 F. 2d 1043.

No. 77–598. GREYHOUND CORP. ET AL. *v.* MT. HOOD STAGES, INC., DBA PACIFIC TRAILWAYS. C. A. 9th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 555 F. 2d 687.

Certiorari Denied. (See also Nos. 77–644 and 77–5623, *supra.*)

No. 76–1157. SOUTHWESTERN BELL TELEPHONE CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 546 F. 2d 243.

No. 76–1375. ZINGER *v.* BLANCHETTE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 901.

No. 76–1609. INDIANA *v.* SCOTTSDALE MALL. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 484.

No. 76–1645. GENERAL DYNAMICS CORP. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 547 S. W. 2d 255.

No. 76–6983. KEEFER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 470 Pa. 142, 367 A. 2d 1082.

No. 77–63. COOPER *v.* TAX COMMISSION OF UTAH. Sup. Ct. Utah. Certiorari denied.

No. 77–79. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* CHILDREN'S HOSPITAL OF PITTSBURGH. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 222.

No. 77–143. MANGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1222.

No. 77–164. LEPPO *v.* UNITED STATES; and
No. 77–169. GOLDSTEIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 1156.

No. 77–214. ATKINS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 214 Ct. Cl. 186, 556 F. 2d 1028.

No. 77–217. BAGERIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–237. NETTERVILLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 903.

No. 77–252. RIVERA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 549 S. W. 2d 209.

No. 77–275. ARTHUR LIPPER CORP. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION; and
No. 77–291. SECURITIES AND EXCHANGE COMMISSION *v.* ARTHUR LIPPER CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 171.

No. 77–294. OLIVA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 346 So. 2d 1066.

No. 77–296. HESTNES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1034.

No. 77–321. UPPER WEST FORK RIVER WATERSHED ASSN. *v.* CORPS OF ENGINEERS, U. S. ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 576.

No. 77–333. WELLHAM ET AL. *v.* UNION BANK ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–337. CASTOR ET AL. *v.* UNITED STATES; and
No. 77–500. DEIN *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 379.

No. 77–338. WETZEL ET AL. *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 558 F. 2d 1028.

No. 77–357. PATTY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 218 Va. 150, 235 S. E. 2d 437.

No. 77–368. BERDICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1329.

No. 77–381. ATKINSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 292 N. C. 730, 235 S. E. 2d 784.

No. 77–396. PACELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 558.

No. 77–406. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and
No. 77–434. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 217, 567 F. 2d 84.

No. 77–416. GARDNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 946.

No. 77–425. GIBSON, SHERIFF *v.* SMALL. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 48.

No. 77–429. FRY ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 557 F. 2d 646.

No. 77–431. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 385.

No. 77–458. WARD *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 280 Md. 485, 374 A. 2d 1118.

No. 77–470. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION No. 391 *v.* PILOT FREIGHT CARRIERS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 205.

No. 77–473. DISTRICT No. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS *v.* SCHULTZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 849.

No. 77–474. JEFFERSON PARISH SCHOOL BOARD *v.* CITY PARK IMPROVEMENT ASSN. ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 345 So. 2d 597.

No. 77–478. PENNSYLVANIA ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir., No. 76–2153. Certiorari denied.

No. 77–480. LOCAL 259, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 38.

No. 77–484. COCHRAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 49.

No. 77–486. MCCORKLE *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1258.

No. 77–488. SEA-LAND SERVICE, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 213 Ct. Cl. 555, 553 F. 2d 651.

No. 77–489. CITY OF WILLCOX ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 287, 567 F. 2d 394.

No. 77–490. BARTER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 550 F. 2d 1239.

No. 77–505. IRWIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 561 F. 2d 198.

No. 77–540. MOORE ET AL. *v.* HAMPTON ROADS SANITATION DISTRICT COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 557 F. 2d 1030.

No. 77–542. FURRATE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1283.

No. 77–548. BERLIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1215.

No. 77–564. HUNTINGTON TOWERS, LTD., ET AL. *v.* FEDERAL RESERVE BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 863.

No. 77–572. JENKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–577. COLEMAN ET AL. *v.* RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–594. STONE *v.* EXPORT-IMPORT BANK OF THE UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 552 F. 2d 132.

No. 77–597. HOOVER ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1219.

No. 77–601. FOUKE CO. *v.* ANIMAL WELFARE INSTITUTE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 109, 561 F. 2d 1002.

No. 77–607. CLARK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 352 So. 2d 170.

No. 77–608. NIZER ET AL. *v.* MEEROPOL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 1061.

No. 77–609. ANDRE ET AL. *v.* BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 561 F. 2d 48.

No. 77–611. KWANG-WEI HAN *v.* ANDERSON AIR CONDITIONING, INC. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 77–612. UNITED MINE WORKERS OF AMERICA *v.* NEDD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 190.

No. 77–617. TERMINAL-HUDSON ELECTRONICS, INC., DBA OPTI-CAL *v.* DUNDAS ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–618. BRAMBLETT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 239 Ga. 336, 236 S. E. 2d 580.

No. 77–619. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* PILOT FREIGHT CARRIERS, INC. C. A. 4th Cir. Certiorari denied.

No. 77–620. GUYTON *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 77–626. COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 228.

No. 77–627. AUSTIN NATIONAL BANK, GUARDIAN *v.* NORTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1061.

No. 77–629. LEACH ET AL. *v.* SAWICKI, JUDGE. Sup. Ct. Ohio. Certiorari denied.

No. 77–632. MURRAY ET AL. *v.* WAGLE. C. A. 9th Cir. Certiorari denied. Reported below: 560 F. 2d 401.

No. 77–640. LAIRD ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1224.

No. 77–647. YETTE *v.* NEWSWEEK MAGAZINE ET AL. Ct. App. D. C. Certiorari denied. Reported below: 376 A. 2d 777.

No. 77–649. DEMOPOLIS CITY SCHOOL SYSTEM *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1053.

No. 77–650. SPENCER *v.* SKELTON ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 98 Idaho 417, 565 P. 2d 1374.

No. 77–655. CROUCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 49.

No. 77–666. VESCO & CO., INC. *v.* INTERNATIONAL CONTROLS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 665.

No. 77–679. VALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 237.

No. 77–680. WALL STREET TRANSCRIPT CORP. ET AL. *v.* WAINWRIGHT SECURITIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 558 F. 2d 91.

No. 77–696. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 77–700. EVANS ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 244.

No. 77–702. AMREP CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 539.

No. 77–703. SINCLAIR *v.* SPATOCCO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–704. GIBBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 28.

No. 77–711. MILLET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 253.

No. 77–718. TOWNSEND *v.* NASSAU COUNTY MEDICAL CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 558 F. 2d 117.

No. 77–720. ROSNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–735. ANZALONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 492.

No. 77–756. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–775. MARCHAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 564 F. 2d 983.

No. 77–797. LA MORDER *v.* LA MORDER. C. A. 5th Cir. Certiorari denied.

No. 77–807. PHELPS *v.* CHRISTISON, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 53.

No. 77–824. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 840.

No. 77–5250. LINKLETTER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 345 So. 2d 452.

No. 77–5271. FLOWERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 558 F. 2d 1231.

No. 77–5287. BLEVINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 1236.

No. 77–5328. HILLIARD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5332. BEASLEY ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 66 Ill. 2d 385, 362 N. E. 2d 1024.

No. 77–5333. TALIAFERRO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 724.

No. 77–5337. DAWSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–5340. CASEBEER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 53.

No. 77–5358. SCHILLACI *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 556 F. 2d 582.

No. 77–5360. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 429.

No. 77–5371. FALCONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 77–5373. MILLER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 217 Va. 929, 234 S. E. 2d 269.

No. 77–5378. SCHICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 219.

No. 77–5379. HODGES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 366.

No. 77–5382. JUZENAS *v.* CITY OF SOUTHFIELD. Cir. Ct., Oakland County, Mich. Certiorari denied.

No. 77–5387. RUDMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–5397. ALLEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 112.

No. 77–5403. TRUDO *v.* UNITED STATES PAROLE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 560.

No. 77–5414. MCMILLAN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 822.

No. 77–5418. BROOKS *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 551 S. W. 2d 634.

No. 77–5426. HEATH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 77–5428. BRUCE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5454. KELLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 257.

No. 77–5455. NICHOLS *v.* TREFFERT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1031.

No. 77–5460. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 340 So. 2d 498.

No. 77–5506. GATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1086.

No. 77–5508. WOODSON *v.* ARNOLD, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5509. DILLINGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1287.

No. 77–5532. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1215.

No. 77–5540. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–5560. GAULDEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–5593. REESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 42.

No. 77–5598. FRANKLIN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 281 Md. 51, 375 A. 2d 1116.

No. 77–5601. GREENE *v.* HOGAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 604.

No. 77–5615. GREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 561 F. 2d 423.

No. 77–5643. MORALES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 129, 366 N. E. 2d 248.

No. 77–5644. JENKINS *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 77–5646. THOMPSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 347 So. 2d 1371.

No. 77–5648. CRUZ ET AL. *v.* WARD, CORRECTIONAL COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 558 F. 2d 658.

No. 77–5650. BURRELL *v.* AARON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 560 F. 2d 988.

No. 77–5651. HAM *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 268 S. C. 340, 233 S. E. 2d 698.

No. 77–5652. REITER *v.* CITY OF KEENE ET AL. Sup. Ct. Tex. Certiorari denied.

No. 77–5654. SELLARS *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 77–5655. INGRAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5656. CHRISTOPHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 561 F. 2d 8.

No. 77–5664. MEIER *v.* SANDEFUR ET AL. Ct. App. Ind. Certiorari denied.

No. 77–5665. CARROLL *v.* TURNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1211.

No. 77–5670. MARTIN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 77–5674. CARSON *v.* ELROD, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF VIRGINIA BEACH, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 44.

No. 77–5676. BEARD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–5678. QURAISHI *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 77–5679. YOUNG *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–5686. STONE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1242.

No. 77–5680. WRIGHT *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–5696. TIMMINS *v.* GORE NEWSPAPERS CO., INC. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 339 So. 2d 255.

No. 77–5700. HAMILTON *v.* UNITED STATES;
No. 77–5704. CHRISTOPHER *v.* UNITED STATES;
No. 77–5705. CHRISTOPHER ET AL. *v.* UNITED STATES; and
No. 77–5707. BRYANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1064.

No. 77–5712. BERARD *v.* HOGAN, CORRECTIONS COMMISSIONER. C. A. 2d Cir. Certiorari denied.

No. 77–5716. SANDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 563 F. 2d 379.

No. 77–5717. NICHOLAS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1330.

No. 77–5718. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1149.

No. 77–5722. WILSON *v.* VOLKSWAGEN OF AMERICA, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 561 F. 2d 494.

No. 77–5723. TAYLOR *v.* RIDDLE, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 563 F. 2d 133.

No. 77–5726. DIXON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 27.

No. 77–5729. VASARAB *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 77–5739. HOLT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 93.

No. 77–5745. HALL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 348 So. 2d 870.

No. 77–5752. COVINGTON ET AL. *v.* FORD, JUDGE. Sup. Ct. Ind. Certiorari denied.

No. 77–5765. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 563 F. 2d 936.

No. 77–5788. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 476.

No. 77–5795. DORSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–5796. VASQUEZ-CAZARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 1329.

No. 77–5799. RAMOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5800. MANCIL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 77–5810. JONES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 960.

No. 77–5812. FORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 1366.

No. 77–5813. ELLIOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5815. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 1361.

No. 77–5816. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 286.

No. 77–5818. HARTFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5821. HINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 564 F. 2d 925.

No. 77–5823. HALE, AKA SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 336.

No. 77–5830. CLAYTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5835. SWETS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 563 F. 2d 989.

No. 77–5844. AGUILAR-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–5847. GRAHAM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 377 A. 2d 1138.

No. 76–1451. ROGERS ET AL. *v.* EXXON RESEARCH & ENGINEERING CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 550 F. 2d 834.

No. 77–26. CHIN *v.* UNITED STATES; and

No. 77–32. CHIN *v.* UNITED STATES. C. A. 2d Cir. Motions of Asian-American Legal Defense & Education Fund and Asian Law Caucus, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 556 F. 2d 560.

No. 77–263. CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ET AL. *v.* MARTIN, U. S. DISTRICT JUDGE, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 556 F. 2d 706.

No. 77–322. HOGAN *v.* ILLINOIS EX REL. KUNCE, JUDGE. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 67 Ill. 2d 55, 364 N. E. 2d 50.

No. 77–383. INTERNATIONAL AMUSEMENTS, DBA ADULT BOOK & CINEMA STORE, ET AL. *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 565 P. 2d 1112.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted following a jury trial in the District Court for Weber County, Utah, for distributing pornographic material in violation of ch. 49, §§ 1 and 4, 1975 Utah Laws (formerly codified at 8 Utah Code Ann. §§ 76–10–1203 and 76–10–1204 (Supp. 1975), current version at Utah Crim. Code §§ 76–10–1203 and 76–10–1204 (1977)). The conviction was affirmed by the Utah Supreme Court. 565 P. 2d 1112 (1977).

Section 76–10–1204 provided in pertinent part at the time of the alleged offense as follows:

> "(1) A person is guilty of distributing pornographic material when he knowingly:
>
> . . . . .
>
> "(c) Distributes or offers to distribute, exhibits or offers to exhibit, any pornographic material to others . . . ."

As used in § 76–10–1204, "pornographic material" was defined by § 76–10–1203 as follows:

> "(a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
>
> "(b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
>
> "(c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

"(2) In any prosecution dealing with an offense relating to pornographic material or performances, or dealing in harmful material, the question whether material or a performance appeals to prurient interest in sex shall be determined with reference to average adults or average minors as the case may be.

"(3) Neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the pornographic character of the material or performance which is the subject of a prosecution under this part."

I adhere to my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 76–10–1204, as it incorporated the definition of "pornographic material" of § 76–10–1203, was constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Utah Supreme Court was rendered after *Miller*, reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

No. 77–624. NESTLER ET AL. *v.* EXXON CORP. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 181 U. S. App. D. C. 411, 559 F. 2d 188.

No. 77–683. MILLER BREWING CO. *v.* G. HEILEMAN BREWING CO., INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 561 F. 2d 75.

No. 77–662. L. & J. PRESS CORP. *v.* MURPHY ET AL. C. A. 8th Cir. Certiorari and/or motion for leave to file petition for writ of mandamus denied. Reported below: 558 F. 2d 407.

No. 77–682. VILLAGE OF ARLINGTON HEIGHTS ET AL. *v.* METROPOLITAN HOUSING DEVELOPMENT CORP. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 558 F. 2d 1283.

No. 77–5427. BOSSINGER ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 347 So. 2d 137.

Rehearing Denied

No. 76–1057. KEY ET AL. *v.* DOYLE ET AL., *ante*, p. 59;

No. 76–1684. SUPER TIRE ENGINEERING CO. ET AL. *v.* MCCORKLE, COMMISSIONER, DEPARTMENT OF INSTITUTIONS AND AGENCIES OF NEW JERSEY, ET AL., *ante*, p. 827;

No. 76–6839. DOWNING *v.* DISTRICT ATTORNEY OF NORTHAMPTON COUNTY, *ante*, p. 846;

No. 76–6909. ROSARIO *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT, *ante*, p. 849;

No. 76–6974. DEVAUGHN *v.* UNITED STATES, *ante*, p. 954;

No. 77–370. KENNY ET AL. *v.* CITY OF PHILADELPHIA; and MACDONALD ET AL. *v.* CITY OF PHILADELPHIA, *ante*, p. 923;

No. 77–374. SLOAN *v.* BONIME ET AL., ante, p. 924;

No. 77–385. DAVIS *v.* DAVIS, *ante*, p. 939;

No. 77–415. SALYERS *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS ET AL., *ante*, p. 924; and

No. 77–437. MARTINEZ ET AL. *v.* UNITED STATES, *ante*, p. 924. Petitions for rehearing denied.

No. 77–517. DOLWIG *v.* UNITED STATES, *ante*, p. 956;
No. 77–5026. WITT *v.* FLORIDA, *ante*, p. 935;
No. 77–5235. WARRINER *v.* FLORIDA ET AL., *ante*, p. 870;
No. 77–5438. CRUM *v.* WALTER H. BRYAN, INC., ET AL., *ante*, p. 942;
No. 77–5498. STUART *v.* ARKANSAS, *ante*, p. 942;
No. 77–5514. SMITH *v.* WHITE STORES, INC., *ante*, p. 958;
No. 77–5542. ZILKA *v.* WALKER ET AL., *ante*, p. 973;
No. 77–5558. WEST *v.* SMITH, *ante*, p. 973; and
No. 77–5618. BALOUN *v.* UNITED STATES, *ante*, p. 974. Petitions for rehearing denied.

No. 75–855. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS ET AL., 424 U. S. 906; and
No. 77–290. COLE *v.* UNITED STATES, *ante*, p. 943. Motions for leave to file petitions for rehearing denied.

JANUARY 16, 1978

Affirmed on Appeal

No. 77–422. NATIONAL EDUCATION ASSN. ET AL. *v.* SOUTH CAROLINA ET AL.; and
No. 77–543. UNITED STATES *v.* SOUTH CAROLINA ET AL. Affirmed on appeal from D. C. S. C. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of these appeals. Reported below: 445 F. Supp. 1094.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

For many years, South Carolina has used the National Teachers' Examinations (NTE) in hiring and classifying teachers, despite the advice of its authors that it should not be used as the State uses it and despite the fact that it serves to disqualify a greater proportion of black applicants than white and to place a greater percentage of black teachers in

lower paying classifications. For example, the new test score requirements contained in the 1976 revision of the State's plan will disqualify 83% of black applicants, but only 17.5% of white applicants; and 96% of the newly certified candidates permitted to teach will be white teachers.

This litigation began when the United States brought suit challenging the use of the NTE under both the Constitution and Title VII of the Civil Rights Act of 1964. The District Court upheld the State's use of the test and rejected both claims. Not only had plaintiffs failed to prove a racially discriminatory purpose in the State's uses of the NTE but, in the view of the District Court, the State had carried its burden of justifying the test despite its disparate racial impact.

The State's evidence in this regard consisted of a validation study prepared by the authors of the test at the request of the State. The District Court deemed the study sufficient to validate the NTE, even though the validation was not in relation to job performance and showed at best that the test measured the familiarity of the candidate with the content of certain teacher training courses.

Washington v. *Davis*, 426 U. S. 229 (1976), was thought by the District Court to have warranted validating the test in terms of the applicant's training rather than against job requirements; but *Washington* v. *Davis*, in this respect, held only that the test there involved, which sought to ascertain whether the applicant had the minimum communication skills necessary to understand the offerings in a police training course, could be used to measure eligibility to enter that program. The case did not hold that a training course, the completion of which is required for employment, need not itself be validated in terms of job relatedness. Nor did it hold that a test that a job applicant must pass and that is designed to indicate his mastery of the materials or skills taught in the training course can be validated without reference to the job. Tests supposedly measuring an applicant's qualifications for employment, if they have differential racial impact,

must bear some "manifest relationship to the employment in question," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971), and it is insufficient for the employer "to demonstrate some rational basis for the challenged practices." *Washington* v. *Davis*, *supra*, at 247.

The District Court here held that no other measures would satisfy the State's interest in obtaining qualified teachers and paying them fairly. But only two other States use the NTE for initial certification and South Carolina is the *only* State which uses the NTE in determining pay. Furthermore, the authors of the test themselves advise against using it for determining the pay for experienced teachers and believe that the NTE should not be the sole criterion for initial certification.

The question here is not merely whether the District Court, applying correct legal standards, reached the correct conclusion on the record before it, but whether the court was legally correct in holding that the NTE need not be validated against job performance and that the validation requirement was satisfied by a study which demonstrated only that a trained person could pass the test.

I therefore dissent from the Court's summary affirmance and would set the case for oral argument.

No. 77–450. PRESSLER, MEMBER, U. S. HOUSE OF REPRESENTATIVES *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. Appeal from D. C. D. C. Motion of James M. Jeffords et al. for leave to file a brief as *amici curiae* granted. Judgment affirmed.

MR. JUSTICE REHNQUIST, concurring.

In joining the summary affirmance of the judgment of the District Court in this case, I think it important to point out that such affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits of the Ascertainment Clause ques-

tion. The District Court decided that appellant did have standing to litigate this issue by virtue of the fact that he was a Member of Congress, but decided the issue against him on the merits. Our "unexplicated affirmance" without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question.

Appeals Dismissed

No. 77–524. MORITT *v.* GOVERNOR OF NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 42 N. Y. 2d 347, 366 N. E. 2d 1285.

No. 77–574. IN RE MURRAY. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: 266 Ind. 221, 362 N. E. 2d 128.

No. 77–582. CHASE BRASS & COPPER CO., INC. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 70 Cal. App. 3d 457, 138 Cal. Rptr. 901.

No. 77–749. A. P. F. *v.* C. M. C., A MINOR, BY CONWAY, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 257 N. W. 2d 282.

No. 77–5740. IN RE DEL RIO, JUDGE. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 400 Mich. 665, 256 N. W. 2d 727.

Certiorari Granted—Reversed and Remanded. (See No. 76–6799, *ante*, p. 332.)

Certiorari Granted—Vacated and Remanded

No. 77–459. HAAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presentedly asserted by the Solicitor General in his memorandum filed December 22, 1977. Reported below: 552 F. 2d 368.

No. 77–508. GTE SYLVANIA, INC., ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware on December 8, 1977. Reported below: 182 U. S. App. D. C. 351, 561 F. 2d 349.

No. 77–631. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* REPUBLIC STEEL CORP. ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of Pub. L. 95–217, 91 Stat. 1566 (Dec. 27, 1977). Reported below: 557 F. 2d 91.

Vacated and Remanded After Certiorari Granted

No. 76–653. ALLIED-GENERAL NUCLEAR SERVICES ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.;

No. 76–762. COMMONWEALTH EDISON CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.;

No. 76–769. WESTINGHOUSE ELECTRIC CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 76–774. BALTIMORE GAS & ELECTRIC CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 2d Cir. [Certiorari granted 430 U. S. 944.] Judgment vacated and cases remanded to consider question of mootness. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these cases. Reported below: 539 F. 2d 824.

Miscellaneous Orders

No. 54, Orig. UNITED STATES *v.* FLORIDA ET AL. Upon consideration of the Report of the Special Master and the joint motion to dismiss, it is ordered that this case be dismissed. [For earlier order herein, see, *e. g.*, 430 U. S. 140.]

No. 75, Orig. IDAHO ET AL. *v.* VANCE, SECRETARY OF STATE, ET AL. Motion of plaintiffs to strike brief in opposition, or in the alternative for an allowance of time to respond, denied. Motion for leave to file bill of complaint denied.

No. 75–1690. PARHAM, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF GEORGIA, ET AL. *v.* J. L. ET AL. D. C. M. D. Ga. [Probable jurisdiction noted, 431 U. S. 936]; and

No. 76–1193. UNITED STATES *v.* JACOBS, AKA "MRS. KRAMER." C. A. 2d Cir. [Certiorari granted, 431 U. S. 937.] Cases restored to calendar for reargument.

No. 76–1484. ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. *v.* STANFORD DAILY ET AL.; and

No. 76–1600. BERGNA, DISTRICT ATTORNEY OF SANTA CLARA COUNTY, ET AL. *v.* STANFORD DAILY ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 816.] Motion of Reporters Committee for Freedom of the Press et al. for leave to participate in oral argument as *amici curiae* denied. Motion of respondents to continue oral argument denied.

No. 76–1596. UNITED STATES *v.* MAURO ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 816]; and

No. 77–52. UNITED STATES *v.* FORD. C. A. 2d Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General to consolidate these cases for oral argument denied.

No. 76–6767. SCOTT ET AL. *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 888.] Motion of Chloe V. Daviage for leave to participate in oral argument as *amicus curiae* denied. Motion of petitioners for divided argument denied.

No. 76–1560. UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 815.] Motion of respondents for additional time for oral argument granted and 10 additional minutes allotted for that purpose. The United States also allotted 10 additional minutes for oral argument. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 77–117. NATIONAL BROILER MARKETING ASSN. *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 888.] Motion of American Farm Bureau Federation for leave to file a brief as *amicus curiae* granted.

No. 77–285. CALIFORNIA ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 984.] Motion of petitioners for additional time for oral argument granted and 15 additional minutes allotted for that purpose. The United States also allotted 15 additional minutes for oral argument.

No. 77–689. INDIANA & MICHIGAN ELECTRIC CO. *v.* CITY OF MISHAWAKA, INDIANA, ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–5710. SPEIGHTS *v.* BUE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Postponed

No. 77–575. JOHN ET AL. *v.* MISSISSIPPI. Appeal from Sup. Ct. Miss.; and

No. 77–836. UNITED STATES *v.* JOHN ET AL. C. A. 5th Cir. Motion of Mississippi Band of Choctaw Indians for leave to file a brief in No. 77–575 as *amicus curiae* granted. In No. 77–575, further consideration of question of jurisdiction postponed to hearing of case on the merits. In No. 77–836, certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 77–575, 347 So. 2d 959; No. 77–836, 560 F. 2d 1202.

Certiorari Granted. (See also No. 77–836, *supra.*)

No. 77–152. BETH ISRAEL HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari granted. Reported below: 554 F. 2d 477.

No. 77–642. PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS *v.* FLOOK. C. C. P. A. Certiorari granted. Reported below: 559 F. 2d 21.

Certiorari Denied

No. 76–1464. UNIVERSITY OF CHICAGO AND ARGONNE *v.* MCDANIEL. C. A. 7th Cir. Certiorari denied. Reported below: 548 F. 2d 689.

No. 77–246. TURLEY *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 554 F. 2d 840.

No. 77–483. SAFFRON *v.* DEPARTMENT OF THE NAVY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 45, 561 F. 2d 938.

No. 77–521. GENERAL MOTORS CORP. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 30, 561 F. 2d 923.

No. 77–581. R. H. MACY & CO., INC., ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (MICROELECTRONIC SYSTEMS CORPORATION OF AMERICA, REAL PARTY IN INTEREST). C. A. 6th Cir. Certiorari denied.

No. 77–587. HARR ET VIR *v.* PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN.; and HARR ET AL. *v.* FEDERAL HOME LOAN BANK BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 557 F. 2d 751 (first case); 557 F. 2d 747 (second case).

No. 77–599. PARKHILL-GOODLOE CO., INC., ET AL. *v.* MCINTOSH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1283.

No. 77–613. NOLAN *v.* NATIONAL TRANSPORTATION SAFETY BOARD. C. A. 10th Cir. Certiorari denied.

No. 77–639. CITY OF HARTFORD ET AL. *v.* TOWN OF GLASTONBURY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 561 F. 2d 1032.

No. 77–660. BYNUM *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 348 So. 2d 804.

No. 77–664. HINISH *v.* SOMERS. Ct. Sp. App. Md. Certiorari denied.

No. 77–670. STOCKHAM VALVES & FITTINGS, INC. *v.* JAMES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 310.

No. 77–675. RING *v.* WADDINGTON, DIRECTOR OF MOTOR VEHICLES OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–678. ATLANTIC SHIPPING, INC. *v.* EDYNAK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 215.

No. 77–698. VAN CURA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 49 Ill. App. 3d 157, 364 N. E. 2d 564.

No. 77–699. CARSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 555 S. W. 2d 133.

No. 77–701. ARTHURS *v.* STERN, EXECUTIVE SECRETARY, BOARD OF REGISTRATION AND DISCIPLINE IN MEDICINE OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 560 F. 2d 477.

No. 77–705. BROWNING-FERRIS INDUSTRIES, INC. *v.* TIGER TRASH, A DIVISION OF JOE W. MORGAN, INC. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 818.

No. 77–706. BENNETT ET AL. *v.* KIGGINS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 377 A. 2d 57.

No. 77–709. WEINBERGER *v.* EQUIFAX, INC. (FORMERLY RETAIL CREDIT CO.). C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 456.

No. 77–712. MARVIN *v.* CENTRAL GULF LINES, INC. (FORMERLY CENTRAL GULF STEAMSHIP CORP.). C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 1295.

No. 77–717. GROSS *v.* NEWBURGER, LOEB & CO. ET AL.; and No. 77–727. FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN *v.* GROSS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 1057.

No. 77–738. STULL *v.* BAYARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 561 F. 2d 429.

No. 77–739. GURTENSTEIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 69 Cal. App. 3d 441, 138 Cal. Rptr. 161.

No. 77–741. MIZOKAMI BROS. OF ARIZONA, INC. *v.* BAYCHEM CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 2d 975.

No. 77–745. OWENS-ILLINOIS, INC. *v.* SCHULTZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 849.

No. 77–748. BURLINGTON NORTHERN, INC. *v.* TORCHIA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 568 P. 2d 558.

No. 77–750. D'ANGELO, RECEIVER *v.* PETROLEOS MEXICANOS. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 89.

No. 77–766. ALBERT *v.* FIRST NATIONAL BANK & TRUST COMPANY OF MARQUETTE, EXECUTOR. Ct. App. Mich. Certiorari denied.

No. 77–767. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, CLC, LOCAL UNION No. 1805 *v.* WESTINGHOUSE ELECTRIC CORP., AEROSPACE DIVISION. C. A. 4th Cir. Certiorari denied. Reported below: 561 F. 2d 521.

No. 77–817. BRISENDINE ET AL. *v.* NATIONAL MOVIE-DINE, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–820. CHASES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 912.

No. 77–821. CHASES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 1038.

No. 77–825. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied.

No. 77–840. NIEVES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1034.

No. 77–876. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 564 F. 2d 100.

No. 77–5214. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1283.

No. 77–5312. SWEETWINE *v.* WARDEN, MARYLAND STATE PENITENTIARY. Baltimore City Ct. Certiorari denied.

No. 77–5389. FEARON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 58 App. Div. 2d 1041, 397 N. Y. S. 2d 294.

No. 77–5406. ADAMS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 77–5431. TYLER *v.* DYER, CLERK, CIRCUIT COURT OF PLATTE COUNTY. C. A. 8th Cir. Certiorari denied.

No. 77–5447. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 77–5452. DIAZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5461. PARTYKA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 561 F. 2d 118.

No. 77–5468. DOUGLAS *v.* WARDEN, PETERSBURG FEDERAL REFORMATORY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 46.

No. 77–5469. BLACKWELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–5555. BREEDEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–5563. SASIADEK *v.* UNITED STATES VETERANS' ADMINISTRATION BOARD OF VETERANS' APPEALS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–5571. TENNENT *v.* AUCOIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 77–5577. RODEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–5591. MCCRACKEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 822.

No. 77–5626. DUDEK, AKA LANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 560 F. 2d 1288.

No. 77–5658. ROLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5663. LYDAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 2d 165.

No. 77–5698. GALE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 181 U. S. App. D. C. 411, 559 F. 2d 188.

No. 77–5738. NATHANIEL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–5741. GATES *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 568 F. 2d 830.

No. 77–5743. BLAKE *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 563 F. 2d 248.

No. 77–5749. GLADNEY *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 194 Colo. 68, 570 P. 2d 231.

No. 77–5753. GREER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–5756. LAYNE *v.* GUNTER. C. A. 1st Cir. Certiorari denied. Reported below: 559 F. 2d 850.

No. 77–5758. JOPLIN *v.* GARRETT. C. A. 10th Cir. Certiorari denied.

No. 77–5759. STEGMANN *v.* GARRISON. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–5761. HOLSEY *v.* GREIF ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 573.

No. 77–5764. ASH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1021.

No. 77–5766. DEGLER *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 49.

No. 77–5767. SANTANA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 57 App. Div. 2d 746, 394 N. Y. S. 2d 16.

No. 77–5783. KINCADE *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 95.

No. 77–5770. GOLSTON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 366 N. E. 2d 744.

No. 77–5773. MANN, TRUSTEE IN BANKRUPTCY *v.* CHRYSLER CORP. C. A. 8th Cir. Certiorari denied. Reported below: 561 F. 2d 1282.

No. 77–5779. JONES *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 558 F. 2d 1034.

No. 77–5793. TALTON *v.* ROBINSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 77–5794. FIVECOAT *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 822.

No. 77–5802. TINDER *v.* MASSACHUSETTS. Municipal Ct., West Roxbury Dist. Certiorari denied.

No. 77–5829. SALAZAR *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: —— Colo. App. ——, 568 P. 2d 101.

No. 77–5833. VILENSKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–5851. BEVERLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 201.

No. 77–5853. SANCHEZ-HUERTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1185.

No 77–5860. SACCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 552.

No. 77–5899. SEDULE *v.* CAPITAL SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5896. CRANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–189. WATSON *v.* UNITED STATES; and

No. 77–219. PLUMLEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 554 F. 2d 474.

No. 77–420. UNITED STATES INDEPENDENT TELEPHONE ASSN. *v.* MCI TELECOMMUNICATIONS CORP. ET AL.;

No. 77–421. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* MCI TELECOMMUNICATIONS CORP. ET AL.; and

No. 77–436. FEDERAL COMMUNICATIONS COMMISSION *v.* MCI TELECOMMUNICATIONS CORP. ET AL. C. A. D. C. Cir. Motions of National Association of Regulatory Utility Commissioners, Tennessee Public Service Commission, and Public Service Commission of the District of Columbia et al. for leave to file briefs in No. 77–436 as *amici curiae* granted. Motion of the State of Michigan et al. for leave to file a brief as *amici curiae* in all three cases granted. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL would grant certiorari in these cases. Reported below: 182 U. S. App. D. C. 367, 561 F. 2d 365.

No. 77–512. MORFORD, ACTING WARDEN *v.* ELLIOTT. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 557 F. 2d 1228.

No. 77–694. INTERNATIONAL BUSINESS MACHINES CORP. *v.* GREYHOUND COMPUTER CORP., INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 559 F. 2d 488.

No. 77–707. BARTHULI *v.* BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 19 Cal. 3d 717, 566 P. 2d 261.

No. 77–5657. BATTIE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 551 S. W. 2d 401.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 77–201. PRICE *v.* PITCHESS, SHERIFF, *ante*, p. 965;

No. 77–496. CARGILE ET AL. *v.* MICHIGAN, *ante*, p. 967;

No. 77–566. HOWIE *v.* UNITED STATES RUBBER CO., INC., ET AL., *ante*, p. 969;

No. 77–590. TIMMONS *v.* MCGRATH, *ante*, p. 985;

No. 77–5286. MORRIS *v.* UNITED STATES, *ante*, p. 971;

No. 77–5357. BOTTOS *v.* AVAKIAN ET AL., *ante*, p. 986;

No. 77–5381. WHITE *v.* UNITED STATES, *ante*, p. 971;

No. 77–5439. HOUSE *v.* STYNCHCOMBE, SHERIFF, ET AL., *ante*, p. 975;

No. 77–5458. GIBSON *v.* UNITED STATES, *ante*, p. 987;

No. 77–5467. TOWNES *v.* UNITED STATES, *ante*, p. 987;

No. 77–5482. MCCORQUODALE *v.* STYNCHCOMBE, SHERIFF, ET AL., *ante*, p. 975;

No. 77–5512. MURPHY *v.* FATZER, CHIEF JUSTICE, SUPREME COURT OF KANSAS, ET AL., *ante*, p. 972;

No. 77–5552. ROBINSON *v.* INDIANA, *ante*, p. 973;

No. 77–5564. POSTON *v.* SOUTH CAROLINA, *ante*, p. 973;

No. 77–5565. GALBRAITH *v.* CITY OF COLUMBUS, OHIO, *ante*, p. 973; and

No. 77–5614. FAIRCHILD *v.* MUNICIPAL COURT OF CALIFORNIA, IMPERIAL COUNTY, IMPERIAL JUDICIAL DISTRICT, *ante*, p. 998. Petitions for rehearing denied.

No. 76–678. SHELL OIL CO. *v.* DARTT, *ante*, p. 99. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 76–6913. KINSLEY *v.* BRENT, DBA SAFEWAY FINANCE CO., INC., ET AL., *ante*, p. 850. Motion for leave to file petition for rehearing denied.

No. 77–571. MOODY *v.* TEXAS, *ante*, p. 985. Motion for consolidation and petition for rehearing denied.

JANUARY 23, 1978

Order Appointing Librarian

It is ordered that Roger F. Jacobs be, and he is hereby, appointed Librarian of this Court effective January 22, 1978.

Appeals Dismissed

No. 77–525. SPICER *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, DBA MEDICAL COLLEGE ET AL., ET AL. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 347 So. 2d 983.

No. 77–658. ASARCO, INC. (FORMERLY AMERICAN SMELTING & REFINING CO.) *v.* MONTANA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Mont. dismissed for want of jurisdiction. Reported below: — Mont. —, 567 P. 2d 901.

No. 77–725. PEACOCK *v.* NORTH CAROLINA. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 293 N. C. 257, 237 S. E. 2d 538.

No. 77–757. FISHER *v.* OMAHA INDEMNITY CO. Appeal from Ct. App. Mich. dismissed for want of substantial federal question.

No. 77–801. FOWLER *v.* MARYLAND STATE BOARD OF LAW EXAMINERS. Appeal from Ct. App. Md. dismissed for want of substantial federal question.

Miscellaneous Orders

No. A–531 (77–878). KEEFER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Reapplication for stay, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–68. IN RE DISBARMENT OF HONOROFF. Disbarment entered. [For earlier order, see 429 U. S. 935.]

No. D–115. IN RE DISBARMENT OF MCCARRON. Disbarment entered. [For earlier order, see *ante*, p. 885.]

No. D–116. IN RE DISBARMENT OF BUTLER. Disbarment entered. [For earlier order, see *ante*, p. 885.]

No. D–118. IN RE DISBARMENT OF RUTTENBERG. Disbarment entered. [For earlier order, see *ante*, p. 885.]

No. D–119. IN RE DISBARMENT OF SUGAR. Disbarment entered. [For earlier order, see *ante*, p. 900.]

No. D–121. IN RE DISBARMENT OF SKONTOS. Disbarment entered. [For earlier order, see *ante*, p. 937.]

No. 76–1621. MCADAMS, EXECUTOR, ET AL. *v.* MCSURELY ET UX. C. A. D. C. Cir. [Certiorari granted *sub nom. McClellan* v. *McSurely*, *ante*, p. 888.] Motion to substitute Herbert H. McAdams III, as Executor of Estate of John L. McClellan, in place of John L. McClellan, deceased, as a party petitioner granted.

No. 77–52. UNITED STATES *v.* FORD. C. A. 2d Cir. [Certiorari granted, *ante*, p. 816.] Motion of Phylis Skloot Bamberger to permit David J. Gottlieb, Esquire, to present oral argument *pro hac vice* granted.

No. 77–240. ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. *v.* BARRY ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 919.] Motions of Blue Shield Assn., American Insurance Assn. et al., and National Association of Insurance Commissioners for leave to file briefs as *amici curiae* granted.

No. 77–262. DUKE POWER CO. *v.* CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL.; and

No. 77–375. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL. Appeals from D. C. W. D. N. C. [Probable jurisdiction noted, *ante*, p. 937.] Motions of Southeastern Legal Foundation and Pacific Legal Foundation for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 77–475. FRY *v.* UNITED STATES. C. A. 6th Cir. Motion to grant petition for certiorari as sanction for the United States' failure to file a timely brief denied.

No. 77–643. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL. C. A. 3d Cir.;

No. 77–765. WADSWORTH, ADMINISTRATOR, NEW HAMPSHIRE EMPLOYERS' BENEFIT TRUST, ET AL. *v.* WHALAND, COMMISSIONER, DEPARTMENT OF INSURANCE OF NEW HAMPSHIRE. C. A. 1st Cir.; and

No. 77–772. DAWSON, ADMINISTRATOR, NORTHERN NEW ENGLAND CARPENTERS HEALTH & WELFARE FUND, ET AL. *v.* WHALAND, COMMISSIONER, DEPARTMENT OF INSURANCE OF NEW HAMPSHIRE. C. A. 1st Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 77–5176. FRANKS *v.* DELAWARE. Sup. Ct. Del. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied.

No. 77–5807. ALLEY *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 77–747. ALLIED STRUCTURAL STEEL CO. *v.* SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL. Appeal from D. C. Minn. Probable jurisdiction noted. Reported below: 449 F. Supp. 644.

Certiorari Granted

No. 77–453. EASTEX, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari granted. Reported below: 550 F. 2d 198.

Certiorari Denied. (See also No. 77–525, *supra.*)

No. 77–314. SWONGER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1223.

No. 77–405. LUSTIG *v.* UNITED STATES; and
No. 77–417. LUSTIG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: No. 77–405, 555 F. 2d 737; No. 77–417, 555 F. 2d 751.

No. 77–424. TUCKER ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–448. NATIONAL AIRLINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 182 U. S. App. D. C. 295, 561 F. 2d 293.

No. 77–495. SWAROVSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 557 F. 2d 40.

No. 77–589. CAHALANE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 560 F. 2d 601.

No. 77–595. U. S. INDUSTRIES, INC. *v.* PAGE ET AL.; and
No. 77–838. PAGE ET AL. *v.* U. S. INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 346.

No. 77–651. UNITED BROADCASTING CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 184 U. S. App. D. C. 124, 565 F. 2d 699.

No. 77–710. CALL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–715. EDWARDS *v.* SUPERIOR COURT OF CALIFORNIA, EL DORADO COUNTY (CARTER ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: See 15 Cal. 3d 623, 542 P. 2d 994.

No. 77–721. EMERY *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–730. REEVES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 567 P. 2d 503.

No. 77–751. HAGENDORFER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 348 So. 2d 1097.

No. 77–758. RICHTER, DBA BODY SHOP *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 559 F. 2d 1168.

No. 77–760. LEVINE ET UX. *v.* STEIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 560 F. 2d 1175.

No. 77–774. SWEENY, EXECUTOR AND TRUSTEE *v.* KNOWLTON ET AL. Sup. Ct. Va. Certiorari denied.

No. 77–776. FORTE TOWERS, INC., ET AL. *v.* CITY OF MIAMI BEACH. Cir. Ct. Fla., Dade County. Certiorari denied.

No. 77–778. HASHEMI *v.* INTER-REGIONAL FINANCIAL GROUP, INC. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 152.

No. 77–781. PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL. *v.* ARLINGTON COUNTY BOARD ET AL. Sup. Ct. Va. Certiorari denied.

No. 77–789. ZABY ET AL. *v.* CALIFORNIA; and DEMARCO ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–796. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* CEDAR COAL CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 560 F. 2d 1153.

No. 77–799. AQUILINO ET AL. *v.* MCGRAW-EDISON CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 89.

No. 77–811. PHELPS DODGE CORP. ET AL. *v.* STATE TAX COMMISSION OF ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 116 Ariz. 175, 568 P. 2d 1073.

No. 77–816. DRIELICK *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 400 Mich. 559, 255 N. W. 2d 619.

No. 77–5422. BRINKLOW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 560 F. 2d 1003.

No. 77–5423. MCMANUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 560 F. 2d 747.

No. 77–5449. RODRIGUEZ *v.* RITCHEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1185.

No. 77–5476. JACKSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 552 S. W. 2d 798.

No. 77–5478. JAQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 28.

No. 77–5529. DEROSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–5545. JONES *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 552 S. W. 2d 45.

No. 77–5548. BRADLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5570. ROSA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 205.

No. 77–5692. WOE *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 40.

No. 77–5709. SOTTILE *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 48.

No. 77–5746. DONALD, AKA DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–5762. JOHNSON *v.* JOHNSON. Sup. Ct. Alaska. Certiorari denied. Reported below: 564 P. 2d 71.

No. 77–5768. TAYLOR *v.* MISSISSIPPI EMPLOYMENT SECURITY COMMISSION ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 348 So. 2d 1347.

No. 77–5771. FAIR, AKA FARRIOR *v.* ROCKEFELLER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–5778. SCHWARTZ *v.* PITTS, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 564 F. 2d 99.

No. 77–5782. SOUZA *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied.

No. 77–5798. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 561 F. 2d 8.

No. 77–5803. BRYANT *v.* BYRD ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–5805. WINDOWS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 247 Pa. Super. 615, 373 A. 2d 1141.

No. 77–5808. HARDWICK *v.* DOOLITTLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 292 and 561 F. 2d 630.

No. 77–5809. TURNER *v.* LANDRY. C. A. 5th Cir. Certiorari denied.

No. 77–5811. GILBERT *v.* YALANZON. Ct. App. Ga. Certiorari denied. Reported below: 143 Ga. App. 131, 237 S. E. 2d 660.

No. 77–5819. TEPLITSKY *v.* BUREAU OF COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–5825. MYERS *v.* AMPEX, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–5828. WASHINGTON *v.* MISSOURI. Ct. App. Mo., Kansas City Dist. Certiorari denied. Reported below: 549 S. W. 2d 547.

No. 77–5840. SAVAGE *v.* CITY OF WORTHINGTON, OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 77–5841. HOLLIS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 77–5842. HOCKINGS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 29 Ore. App. 139, 562 P. 2d 587.

No. 77–5843. HILL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1021.

No. 77–5849. PEARSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 77–5850. SMILEY *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 77–5856. CEDRONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 2d 1166.

No. 77–5866. MORGAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1001.

No. 77–5868. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–5880. GARCIA-RODRIGUEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 956.

No. 77–5881. ROBIDEAU *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5883. RAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–5885. IMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 970.

No. 77–5886. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5888. SCHLAEBITZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–5894. STEELE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 1058.

No. 77–5897. NISNEWITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5904. BLACHOWIAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 392.

No. 77–5906. SIZEMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–5912. LaFONTAINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1185.

No. 77–5914. CLOUD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5917. DILLARD *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1202.

No. 77–5924. LEMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 96.

No. 77–5925. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5929. McBRIDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–97. ALLIED CHEMICAL CORP. *v.* WHITE ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 538 F. 2d 1094.

No. 77–665. UNITED STATES *v.* PITCAIRN. Ct. Cl. Motions of Bell Helicopter Textron and Eltra Corp. for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 212 Ct. Cl. 168 and 224, 547 F. 2d 1106.

No. 77–823. WEYERHAEUSER CO. *v.* SHEPLER ET AL. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 279 Ore. 477, 569 P. 2d 1040.

Rehearing Denied

No. 77–443. JOSEPH SKILKEN & CO. ET AL. *v.* CITY OF TOLEDO ET AL., *ante*, p. 985;

No. 77–554. GLOBE LININGS, INC., ET AL. *v.* CITY OF CORVALLIS ET AL., *ante*, p. 985;

No. 77–5553. BROCK *v.* TEXAS, *ante*, p. 1002; and

No. 77–5620. YOUNG *v.* GEORGIA, *ante*, p. 1002. Petitions for rehearing denied.

No. 76–1333. BEER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 431 U. S. 938. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

JANUARY 24, 1978

Dismissals Under Rule 60

No. 77–737. GOODYEAR TIRE & RUBBER CO. *v.* BIG O TIRE DEALERS, INC. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 561 F. 2d 1365.

No. 77–867. DANSKER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 565 F. 2d 1262.

FEBRUARY 21, 1978

Affirmed on Appeal

No. 77–504. ENOMOTO, CORRECTIONS DIRECTOR, ET AL. *v.* WRIGHT ET AL. Affirmed on appeal from D. C. N. D. Cal. Reported below: 462 F. Supp. 397.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Appellants seek to appeal to this Court a decision of a three-judge District Court pursuant to 28 U. S. C. § 1253. That section provides for a direct appeal from any "suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." If no Act of Congress required a three-judge District Court to hear this suit, the decision cannot be appealed directly to this Court pursuant to § 1253 even though a three-judge court may have been in fact convened. Appeal lies instead to the United States Court of Appeals. Under such circumstances, we do not have jurisdiction to consider the appeal. *Board of Regents* v. *New Left Education Project*, 404 U. S. 541 (1972);

Moody v. *Flowers*, 387 U. S. 97 (1967); *Phillips* v. *United States*, 312 U. S. 246 (1941). Because I believe that no Act of Congress required a three-judge District Court in this case, I believe that the Court therefore errs in considering the merits of the appeal.

Appellee prisoners sued appellants, officials of the California prison system, in the District Court for the Northern District of California contending that constitutionally insufficient procedural safeguards are provided a prisoner who is placed into administrative segregation. A three-judge court was convened under 28 U. S. C. § 2281 (now repealed) which at the time this action was filed provided for such a court whenever the constitutionality of a "State statute . . . or of an order made by an administrative board or commission acting under State statutes" is challenged.

It is the second clause of § 2281 that is relevant here since appellees challenge no state statute. The District Court based its jurisdiction on a presumed challenge to various regulations promulgated and issued by the Director of the Department of Corrections of the State of California. According to the District Court, these regulations are "formal orders of statewide application" and thus a challenge to their constitutionality provides jurisdiction under § 2281. Both because the regulations would not appear to be "order[s] made by an administrative board or commission" and because appellees would not appear to challenge the regulations, I do not believe that a three-judge District Court was required by § 2281.

"[T]he three-judge court statute is to be strictly construed." *Board of Regents* v. *New Left Education Project*, *supra*, at 545. Loose construction of § 2281 to require a three-judge court not only "entails a serious drain upon the federal judicial system" but also, inasmuch as direct review is in this Court, "defeat[s] the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within

narrow confines our appellate docket." *Phillips* v. *United States, supra,* at 250. Section 2281 does not speak broadly in terms of "formal orders," as the District Court would assume. Instead, it requires a three-judge court to be convened only where a plaintiff challenges an "order made by an *administrative board or commission.*" (Emphasis added.) Here, the orders allegedly under attack were issued by only one man, the Director of the Department of Corrections. While Congress could have given three-judge courts jurisdiction over orders issued by any state official, it did not. When Congress uses exact terms such as "administrative board" and "commission," it clearly does not intend to include state officials.

Even assuming that an order of a single state official can provide jurisdiction for a three-judge District Court here appellees' complaint does not bring into question the constitutionality of the regulations. As the District Court observed, the regulations provide for prior notice and a hearing "when possible"; these same regulations provide that an inmate should have the assistance of a caseworker or investigating officer when he is unable to prepare his own defense and should be allowed to testify and present documentary evidence; finally, a written statement of the outcome of the hearing is required. Appellees presumably do not object to these procedural safeguards. Instead, they argue that these regulations are not strictly followed, and that wardens are constitutionally obligated to go even further than the regulations require and provide for additional procedural protections such as cross-examination.

There is no allegation that the regulations prohibit additional procedural safeguards. The rules, which are entitled "*General* Procedures," simply provide an outline for the procedures to be followed when a prisoner is placed in administrative segregation. Presumably, each warden is free to supplement these minimum procedures as he sees fit. While wardens may be providing the minimum procedures with the

acquiescence and even approval of the Director, the choice of procedures (beyond the minimum required by the regulations) remains that of the warden and does not bind any other prison in California. Under such circumstances, the regulations of the Director, even if an order of an "administrative board or commission," is not an order of "general application" and thus will not provide jurisdiction for a three-judge District Court. See *Griffin* v. *County School Board,* 377 U. S. 218 (1964).

Because a three-judge court was not required in this case, we do not have appellate jurisdiction and are not free to reach the merits. *Board of Regents* v. *New Left Education Project, supra,* and cases cited therein. Under such circumstances in the past, we have vacated the judgment and remanded with instructions to enter a fresh decree so that appellants may, if they desire, perfect a timely appeal to the Court of Appeals. I would follow that course here.

Appeals Dismissed

No. 77–493. BLOCK C–11, LOT 11, ET AL. *v.* ATLANTIC CITY. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 74 N. J. 34, 376 A. 2d 926.

No. 77–636. ROBERTS *v.* JOHNSON, FIRE MARSHAL OF SOUTH CAROLINA. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. Reported below: 269 S. C. 119, 236 S. E. 2d 737.

No. 77–822. LANE *v.* GALLMAN ET AL., TAX COMMISSION OF NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 3d. Jud. Dept., dismissed for want of substantial federal question. Reported below: 49 App. Div. 2d 963, 373 N. Y. S. 2d 700.

No. 77–842. DAVIS ET UX. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of substantial federal question. Reported below: 71 Cal. App. 3d 998, 139 Cal. Rptr. 797.

No. 77–875. RANKIN *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question.

No. 77–877. HORTON ET AL. *v.* OKLAHOMA CITY, OKLAHOMA, ET AL. Appeal from Sup. Ct. Okla. dismissed for want of substantial federal question. Reported below: 566 P. 2d 431.

No. 77–883. DAPPOLONIA *v.* BOARD OF CHIROPRACTIC EXAMINERS OF FLORIDA. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of substantial federal question. Reported below: 346 So. 2d 656.

No. 77–862. CAL-CUT PIPE & SUPPLY, INC., DBA WESTERN PIPE & TUBE CO. *v.* SOUTHERN IDAHO PIPE & STEEL CO. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 98 Idaho 495, 567 P. 2d 1246.

No. 77–934. LAWRENCE ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 48 Ill. App. 3d 834, 363 N. E. 2d 116.

No. 77–5908. HAMPTON *v.* ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 569 P. 2d 138.

No. 77–5938. LAYTON ET AL. *v.* OHIO. Appeal from Ct. App. Ohio, Hancock County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–5964. WAYLAND *v.* FURNARI. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–899. MILLER ET AL. *v.* HEFFERNAN, TAX COMMISSIONER OF CONNECTICUT. Appeal from Sup. Ct. Conn. Motions of Connecticut Legal Fund and Salisbury Taxpayers Assn. for leave to file briefs as *amici curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 173 Conn. 506, 378 A. 2d 572.

Certiorari Granted—Vacated and Remanded

No. 77–5747. HADDAD *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the views expressed by the Solicitor General in his memorandum filed January 31, 1978. MR. JUSTICE WHITE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST dissent.

Miscellaneous Orders

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. It is ordered that the Honorable Walter E. Hoffman, Senior Judge of the United States District Court for the Eastern District of Virginia, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be

borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see *ante*, p. 917.]

No. 76, Orig. CALIFORNIA *v.* TEXAS. Motion for leave to file bill of complaint set for oral argument in due course. [For earlier order herein, see *ante*, p. 993.]

No. 76–1610. AYALA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of petitioner to reopen and supplement record granted.

No. 77–69. PANORA, REGISTRAR OF MOTOR VEHICLES OF MASSACHUSETTS *v.* MONTRYM. Appeal from D. C. Mass. Motion of appellees to vacate judgment granted. The Court's order of October 31, 1977 (*ante*, p. 916), vacating judgment of the District Court and remanding case for further consideration is hereby vacated, and appeal is restored to Court's docket for appropriate action. Should the parties desire to file supplemental briefs in light of the District Court's October 6, 1977, opinion, they may do so on or before March 24, 1978.

No. 77–408. INGALLS SHIPBUILDING CORP., DIVISION OF LITTON SYSTEMS, INC. *v.* MORGAN ET AL., *ante*, p. 966. Motion of respondents for attorney's fees denied without prejudice to presenting a motion to the United States Court of Appeals for the Fifth Circuit.

No. 77–599. PARKHILL-GOODLOE CO., INC., ET AL. *v.* MCINTOSH ET AL., *ante*, p. 1033. Motion of respondent Rudolph McIntosh for award of attorney's fee denied without prejudice to presenting a motion to the United States Court of Appeals for the Fifth Circuit.

No. 77–10. EXXON CORP. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–11. SHELL OIL CO. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–12. CONTINENTAL OIL CO. ET AL. *v.* GOVERNOR OF MARYLAND ET AL.;

No. 77–47. GULF OIL CORP. *v.* GOVERNOR OF MARYLAND ET AL.; and

No. 77–64. ASHLAND OIL, INC., ET AL. *v.* GOVERNOR OF MARYLAND ET AL. Appeals from Ct. App. Md. [Probable jurisdiction noted, *ante*, p. 814.] Motion of the State of California for leave to file a brief as *amicus curiae* granted. Motion of National Congress of Petroleum Retailers for leave to participate in oral argument as *amicus curiae* denied. Motion of appellees for divided argument granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 77–627. AUSTIN NATIONAL BANK, GUARDIAN *v.* NORTON ET AL., *ante*, p. 1014. Motion of respondent to assess damages pursuant to this Court's Rule 56 (4) denied.

No. 77–910. GOVERNMENT OF THE VIRGIN ISLANDS ET AL. *v.* VITCO, INC. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–5960. ROOTS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Motion for leave to file petition for writ of habeas corpus denied.

No. 77–5824. EVERS *v.* UNITED STATES;

No. 77–5878. GRANT *v.* CONNECTICUT;

No. 77–5882. KAPLAN *v.* WHIPPLE ET AL., JUDGES; and

No. 77–5974. NEWSOME *v.* COLLINSON ET AL., U. S. DISTRICT JUDGES. Motions for leave to file petitions for writs of mandamus denied.

No. 77–5792. KORDJA *v.* NEW JERSEY. Motion for leave to file petition for writ of certiorari denied.

No. 77–5873. SELLARS *v.* BUSCH ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 77–742. MILLER, DIRECTOR, DEPARTMENT OF CHILDREN AND FAMILY SERVICES OF ILLINOIS, ET AL. *v.* YOUAKIM ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted. MR. JUSTICE STEVENS took no part in the consideration or decision of this matter. Reported below: 562 F. 2d 483.

No. 77–837. NEW MOTOR VEHICLE BOARD OF CALIFORNIA ET AL. *v.* ORRIN W. FOX CO. ET AL.; and

No. 77–849. NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSN. ET AL. *v.* ORRIN W. FOX CO. ET AL. Appeals from D. C. C. D. Cal. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 440 F. Supp. 436.

No. 77–888. VITEK, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. *v.* JONES ET AL. Appeal from D. C. Neb. Probable jurisdiction noted. Reported below: 437 F. Supp. 569.

No. 77–5903. CORBITT *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 74 N. J. 379, 378 A. 2d 235.

Certiorari Granted

No. 77–539. ZENITH RADIO CORP. *v.* UNITED STATES. C. C. P. A. Certiorari granted. Reported below: 562 F. 2d 1209.

No. 77–752. NATIONAL LABOR RELATIONS BOARD *v.* CATHOLIC BISHOP OF CHICAGO ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 559 F. 2d 1112.

No. 77–832. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* FIRST LINCOLNWOOD CORP. C. A. 7th Cir. Certiorari granted. Reported below: 560 F. 2d 258.

No. 77–911. NATIONAL LABOR RELATIONS BOARD *v.* ROBBINS TIRE & RUBBER CO. C. A. 5th Cir. Certiorari granted. Reported below: 563 F. 2d 724.

No. 77–719. CHAPMAN, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF TEXAS, ET AL. *v.* HOUSTON WELFARE RIGHTS ORGANIZATION ET AL. C. A. 5th Cir. Certiorari granted and case set for oral argument with No. 77–5324, immediately *infra*. Reported below: 555 F. 2d 1219.

No. 77–5324. GONZALEZ, GUARDIAN *v.* YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, ET AL. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 77–719, immediately *supra*. Reported below: 560 F. 2d 160.

No. 77–753. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* DANIEL; and

No. 77–754. LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* DANIEL. C. A. 7th Cir. Motion of American Bankers Assn. for leave to file a brief as *amicus curiae* in No. 77–753 granted. Motions of National Association of Manufacturers, ERISA Industry Committee, National Coordinating Committee for Multiemployer Plans, American Federation of Labor & Congress of Industrial Organizations, and Gray Panthers for leave to file briefs as *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 561 F. 2d 1223.

Certiorari Denied. (See also Nos. 77–862, 77–934, 77–5908, 77–5938, and 77–5964, *supra.*)

No. 76–1327. GOODROE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 77–466. POMPONIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 1172.

No. 77–475. FRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–498. RODRIGUEZ *v.* UNITED STATES; and
No. 77–538. GERALDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 638.

No. 77–522. DOZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–526. CHITTY *v.* UNITED STATES; and POSTAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 604 (first case); 559 F. 2d 234 (second case).

No. 77–527. RAMSEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 67 and 183 U. S. App. D. C. 129; 538 F. 2d 415 and 561 F. 2d 1022.

No. 77–583. FORSACK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1297.

No. 77–584. NEUSTEIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–588. PIASCIK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 559 F. 2d 545.

No. 77–596. GULF OIL CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 563 F. 2d 588.

No. 77–610. HARDING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 563 F. 2d 299.

No. 77–614. U-ANCHOR ADVERTISING, INC. *v.* BURT, DBA GRANOT LODGE. Sup. Ct. Tex. Certiorari denied. Reported below: 553 S. W. 2d 760.

No. 77–621. DADE CHRISTIAN SCHOOLS, INC. *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 310.

No. 77–628. MAGILL ET AL. *v.* LYNCH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 560 F. 2d 22.

No. 77–630. NATIONAL BERYLLIA CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 42.

No. 77–633. IRVIN ET UX. *v.* SIMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 1030.

No. 77–638. GRANADEROS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied.

No. 77–641. CANTU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1173.

No. 77–645. DER-RONG CHOUR *v.* FERRO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1289.

No. 77–646. BRAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1312.

No. 77–652. DIXON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 919.

No. 77–656. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 224.

No. 77–659. WESTERN UNION TELEGRAPH CO. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 561 F. 2d 477.

No. 77–663. CENTENO SUPER MARKETS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 442.

No. 77–667. BARKER, EXECUTRIX *v.* PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS. C. C. P. A. Certiorari denied. Reported below: 559 F. 2d 588.

No. 77–671. DELTA AIR LINES, INC. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 561 F. 2d 381.

No. 77–673. QUADE ET AL., DBA NORTHWEST TRUCK RENTALS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 563 F. 2d 375.

No. 77–685. COUNTY OF SUFFOLK ET AL. *v.* SECRETARY OF THE INTERIOR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 1368.

No. 77–687. MEREDITH *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 3d 777, 567 P. 2d 746.

No. 77–690. STONE ET AL. *v.* UNITED STATES;

No. 77–724. GOLDSTEIN *v.* UNITED STATES; and

No. 77–5730. DAIDONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 775.

No. 77–708. MCGRATH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 558 F. 2d 1102.

No. 77–723. CASSITY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–726. J. P. STEVENS & CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 8.

No. 77–728. SCHOOL DISTRICT OF OMAHA ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 127.

No. 77–729. STOUFFER CORP., DBA STOUFFER'S CINCINNATI INN *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied.

No. 77–744. CARVEL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. Reported below: 560 F. 2d 1030.

No. 77–746. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 744.

No. 77–768. COOK COUNTY ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 53.

No. 77–777. MILLER *v.* HARRIS, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 313.

No. 77–779. IN RE GILLIS. C. A. 6th Cir. Certiorari denied.

No. 77–788. COLE ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 77–791. CROSSROADS BOOKS, INC. *v.* TOA ENTERPRISES, INC. Sup. Ct. Va. Certiorari denied.

No. 77–793. KING ET AL. *v.* PUBLIC SERVICE EMPLOYEES LOCAL UNION 572, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 297.

No. 77–798. GULF OIL CORP. *v.* MADDOX. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 733, 567 P. 2d 1326.

No. 77–800. OUACHITA NATIONAL BANK IN MONROE *v.* ROWAN ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 345 So. 2d 1014.

No. 77–804. JOACHIM *v.* JOACHIM. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 57 App. Div. 2d 546, 393 N. Y. S. 2d 63.

No. 77–808. KANSAS CITY AREA TRANSPORTATION AUTHORITY OF THE KANSAS CITY AREA TRANSPORTATION DISTRICT *v.* ASHLEY ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 555 S. W. 2d 9.

No. 77–810. FORD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 546 F. 2d 413.

No. 77–812. DEAN *v.* AMERICAN SECURITY INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1036.

No. 77–813. URIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1186.

No. 77–814. HEIZER CORP. *v.* WRIGHT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 236.

No. 77–815. WHITE PLAINS NURSING HOME *v.* COMMISSIONER, DEPARTMENT OF HEALTH OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 42 N. Y. 2d 838, 366 N. E. 2d 79.

No. 77–819. HUDSON ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–827. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–828. GUNTHER ET AL. *v.* MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION. Ct. Sp. App. Md. Certiorari denied.

No. 77–829. PATTERSON ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 77–830. O'CONNOR *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 77–831. LO-VACA GATHERING CO. *v.* RAILROAD COMMISSION OF TEXAS. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 565 F. 2d 144.

No. 77–833. GOLDMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 563 F. 2d 501.

No. 77–834. FUNGER ET AL. *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. Ct. App. Md. Certiorari denied. Reported below: 280 Md. 686, 376 A. 2d 483.

No. 77–844. MONONGAHELA POWER CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; and

No. 77–845. POTOMAC EDISON CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 77–847. SUPERIOR OIL CO. *v.* STERLING ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 737, 567 P. 2d 1325.

No. 77–848. NORTHERN NATURAL GAS PRODUCING CO. ET AL. *v.* NIX ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 739, 567 P. 2d 1322.

No. 77–850. KEYES ET AL. *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 77–853. WALTON ET UX. *v.* PAPAGIANOPOULOS ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 77–854. PROVIDENCE HOSPITAL *v.* MANHATTAN CONSTRUCTION COMPANY OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 1026.

No. 77–856. PHILLIPS PETROLEUM CO. *v.* SHUTTS, EXECUTOR. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 527, 567 P. 2d 1292.

No. 77–858. PUBLIC BROADCASTING SERVICE *v.* NETWORK PROJECT ET AL.; and

No. 77–864. CORPORATION FOR PUBLIC BROADCASTING *v.* NETWORK PROJECT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 70, 561 F. 2d 963.

No. 77–860. CLUBB *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 350 So. 2d 693.

No. 77–861. HILDEBRAND *v.* UNEMPLOYMENT INSURANCE APPEALS BOARD OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 3d 765, 566 P. 2d 1297.

No. 77–871. TERRY ET UX. *v.* KLAMATH PRODUCTION CREDIT ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 777 and 778.

No. 77–873. MOODY ET AL. *v.* TEXAS ET AL. Ct. Civ. App. Tex. 10th Sup. Jud. Dist. Certiorari denied. Reported below: 538 S. W. 2d 158.

No. 77–878. KEEFER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–882. WODOSLAWSKY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 36 Md. App. 654, 374 A. 2d 917.

No. 77–893. GERTLER ET VIR *v.* CITY OF NEW ORLEANS ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 346 So. 2d 228.

No. 77–895. RYAN ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 77–896. VILLAGE OF NORTHBROOK ET AL. *v.* NORTHBROOK TRUST & SAVINGS BANK ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 47 Ill. App. 3d 879, 365 N. E. 2d 433.

No. 77–897. MERIDOR ET AL. *v.* GOLDBERG ET AL.; and
No. 77–940. SINGER *v.* GOLDBERG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 567 F. 2d 209.

No. 77–905. COX, ADMINISTRATRIX *v.* ADMINISTRATOR, VETERANS' ADMINISTRATION, ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–907. JORDAN *v.* U. S. NATURAL RESOURCES, INC., IRVINGTON MOORE DIVISION. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 92.

No. 77–912. ALASKA ROUGHNECKS & DRILLERS ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 555 F. 2d 732.

No. 77–913. PAPADOPOULOS *v.* OREGON STATE UNIVERSITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1183.

No. 77–916. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–918. FIRST NATIONAL BANK OF GLEN HEAD *v.* KATZ, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. Reported below: 568 F. 2d 964.

No. 77–921. PAGLIARA, AKA SELLS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 47 Ill. App. 3d 708, 365 N. E. 2d 72.

No. 77–923. OLINKRAFT, INC. *v.* CLARK. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1219.

No. 77–924. KENT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 77–927. HARRIS, ADMINISTRATRIX *v.* FIREMAN'S FUND AMERICAN LIFE INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 54.

No. 77–930. WATTS *v.* ILLINOIS; and

No. 77–937. NELSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 47 Ill. App. 3d 798, 365 N. E. 2d 415.

No. 77–931. KUNKLE, DBA R. J. RESTORATION CO. *v.* EGGLESTON. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 77–933. WESTERVELT *v.* CENTRAL ILLINOIS PUBLIC SERVICE CO. Sup. Ct. Ill. Certiorari denied. Reported below: 67 Ill. 2d 207, 367 N. E. 2d 661.

No. 77–935. HELENE CURTIS INDUSTRIES, INC. *v.* CHURCH & DWIGHT CO., INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 1325.

No. 77–941. ENDER *v.* CHRYSLER CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 566 F. 2d 1176.

No. 77–942. REYNOLDS *v.* WETLI. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1220.

No. 77–954. GRESEN *v.* FEIKES ET AL. Sup. Ct. Nev. Certiorari denied.

No. 77–975. SUMMERS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 348 So. 2d 1126.

No. 77–1006. JACEK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 565 F. 2d 86.

No. 77–1007. LEFFERDINK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–1009. HEDGEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 564 F. 2d 763.

No. 77–1014. SURVEY ENGINEERS, INC. *v.* ZOLINE FOUNDATION ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 193 Colo. 488, 568 P. 2d 436.

No. 77–1021. URDIALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 273.

No. 77–1023. PACEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 306.

No. 77–5419. TWYMAN *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 560 F. 2d 422.

No. 77–5477. MOORE *v.* HOGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 28.

No. 77–5494. ATKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 558 F. 2d 133.

No. 77–5503. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 90.

No. 77–5515. HAMPTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 89.

No. 77–5519. DODSON *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 551 S. W. 2d 932.

No. 77–5524. PROVO *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 565 P. 2d 719.

No. 77–5554. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–5557. EDWARDS *v.* LANG ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 2d 474.

No. 77–5580. KEATING *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 551 S. W. 2d 589.

No. 77–5587. DEL VALLE-ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 779.

No. 77–5613. PRESTON *v.* GEORGIA. C. A. 5th Cir. Certiorari denied.

No. 77–5617. MILLHOUSE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 563 F. 2d 1083.

No. 77–5621. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1215.

No. 77–5631. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 453.

No. 77–5633. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–5639. BANKS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5640. BROWN *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 44.

No. 77–5641. RICHARDSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 476.

No. 77–5645. PETTICOLAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–5647. HENNE *v.* FIKE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 563 F. 2d 809.

No. 77–5660. HOCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 49.

No. 77–5666. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5667. SILLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 563 F. 2d 1083.

No. 77–5668. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–5669. FRANKLIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5684. LAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 568 P. 2d 295.

No. 77–5688. GRANATA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5693. JOHNSON *v.* WILLIAMS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1212.

No. 77–5701. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 788.

No. 77–5702. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1206.

No. 77–5711. KLEIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1236.

No. 77–5720. BURROUGHS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 77–5721. THORNTON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 239 Ga. 693, 238 S. E. 2d 376.

No. 77–5724. BIRMINGHAM *v.* EISELE, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied.

No. 77–5725. BUMPERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–5727. CHAPPELL *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1214.

No. 77–5731. CURRY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 77–5732. ORQUIZ *v.* UNITED STATES; and
No. 77–5791. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1022.

No. 77–5734. BARBOSA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 77–5736. RICCARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5744. BUSTAMANTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1296.

No. 77–5751. MCMILLIAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 2d 1035.

No. 77–5754. COZAD *v.* JOHNSON, DIRECTOR, U. S. INDIAN HEALTH SERVICE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–5763. LIPINSKI *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 557 F. 2d 289.

No. 77–5772. HODGES *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 349 So. 2d 250.

No. 77–5774. VELLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 275.

No. 77–5789. LAMBROS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 26.

No. 77–5790. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 151.

No. 77–5797. LEJA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 563 F. 2d 244.

No. 77–5801. FRIVALDO *v.* CLELAND, ADMINISTRATOR, VETERANS' AFFAIRS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–5804. SIMMONS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 77–5806. WEAVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 129.

No. 77–5827. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 133, 566 F. 2d 798.

No. 77–5834. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–5846. JOHNSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 565 F. 2d 179.

No. 77–5859. CALDWELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 293 N. C. 336, 237 S. E. 2d 742.

No. 77–5861. HEADS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 77–5862. LODEN *v.* THOMPSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 77–5867. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5870. BARNETT ET UX. *v.* CISNEROS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 190.

No. 77–5871. KOSSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 959.

No. 77–5872. ALLEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–5876. HARPER *v.* RIDDLE, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 77–5877. CARROLL *v.* MANSON, CORRECTIONS COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–5879. WALKER ET AL. *v.* PIERCE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 560 F. 2d 609.

No. 77–5900. HALL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 964.

No. 77–5905. LATIMORE ET AL. *v.* SIELAFF ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 561 F. 2d 691.

No. 77–5907. BUTLER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 353 So. 2d 673.

No. 77–5909. PHILLIPS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–5910. MASON *v.* MULLIGAN, U. S. ATTORNEY. C. A. 7th Cir. Certiorari denied.

No. 77–5911. SMITH *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 33 N. C. App. 511, 235 S. E. 2d 860.

No. 77–5913. ROCHE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 564 F. 2d 100.

No. 77–5918. BEVERLY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–5920. SAND *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 364.

No. 77–5922. KINES *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 367 N. E. 2d 861.

No. 77–5926. JOHNSON *v.* BARGE. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 552 S. W. 2d 508.

No. 77–5928. HENDRIX *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 255 N. W. 2d 170.

No. 77–5932. FARRELL ET AL. *v.* CZARNETZKY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 566 F. 2d 381.

No. 77–5934. BEHM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 49 Ill. App. 3d 574, 364 N. E. 2d 636.

No. 77–5937. SLOTNICK *v.* STAVISKEY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 560 F. 2d 31.

No. 77–5943. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 1164.

No. 77–5944. FLOWERS *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 365 N. E. 2d 839.

No. 77–5945. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 545.

No. 77–5946. WIGGINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–5947. JEFFERSON *v.* SANDERS, CHIEF JUSTICE, SUPREME COURT OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–5950. OREJUELA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5952. THOMAS-BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 576.

No. 77–5959. PIERCE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 50 Ill. App. 3d 525, 365 N. E. 2d 988.

No. 77–5961. BURNSED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 882.

No. 77–5963. RAITPORT *v.* BANK & TRUST COMPANY OF OLD YORK ROAD ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–5966. JOLLY *v.* CRISP, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 77–5968. CROSS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 566 F. 2d 1178.

No. 77–5969. PIERCE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1339.

No. 77–5970. CHINNICI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1170.

No. 77–5973. SIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–5977. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 349 So. 2d 1196.

No. 77–5979. BERNOTAS ET UX. *v.* CHESTER COUNTY WATER RESOURCES AUTHORITY. Sup. Ct. Pa. Certiorari denied.

No. 77–5980. REINERT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 77–5981. REDMOND *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 67 Ill. 2d 242, 367 N. E. 2d 703.

No. 77–5982. SMITH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 77–5983. BOWEN *v.* ABSHIRE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–5986. THROWER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–5989. BROCKUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–5990. SAVAGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1170.

No. 77–5993. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 244.

No. 77–5998. ANDERSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 289, 370 N. E. 2d 318.

No. 77–6001. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6004. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 799.

No. 77–6007. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1185.

No. 77–6010. ANTHONY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 533.

No. 77–6011. DELGADILLO-AYALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 779.

No 77–6012. SHEPARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–6021. HEGWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 946.

No. 77–6034. SAVAGE-EL *v.* ARNOLD, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–6040. GARCIA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–6041. EHNES *v.* FLYNN ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6042. BEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6043. PEARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 243.

No. 77–6045. SCOTT *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 77–6060. BYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1311.

No. 77–6075. MORGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1311.

No. 77–6076. OROPEZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 316.

No. 77–6086. WALDRON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 568 F. 2d 185.

No. 77–6098. LIPSCOMB *v.* UNITED STATES ATTORNEY ET AL. C. A. 7th Cir. Certiorari denied.

No. 77–6105. GORIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 159.

No. 77–447. RATCHFORD, PRESIDENT, UNIVERSITY OF MISSOURI, ET AL. *v.* GAY LIB ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE would grant petition and give plenary consideration to this case. Reported below: 558 F. 2d 848.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

There is a natural tendency on the part of any conscientious court to avoid embroiling itself in a controversial area of social policy unless absolutely required to do so. I therefore completely understand, if I do not agree with, the Court's decision to deny certiorari in this case. In quick summary, the University of Missouri, exercising the traditional authority granted to it by the State to regulate what student organizations will have access to campus facilities, denied recognition to respondent Gay Lib. The denial stemmed from a finding by a University-appointed hearing officer that formal University

recognition would "tend to expand homosexual behavior which will cause increased violations of [the State's sodomy statute]." Respondents, choosing to remove the dispute from its traditional University setting to the federal courts, sued in the United States District Court for the Western District of Missouri, claiming that the denial infringed their constitutional rights to free speech and freedom of association. The District Court held that the University had not violated respondents' constitutional rights. *Gay Lib* v. *University of Missouri*, 416 F. Supp. 1350 (1976). Respondents, continuing to pursue a judicial solution to their problem, persuaded two judges of a three-judge panel of the Court of Appeals for the Eighth Circuit to reverse the District Court. 558 F. 2d 848 (1977). A petition for rehearing en banc was denied by an equally divided court. The University now seeks certiorari here to review that decision.

Courts by nature are passive institutions and may decide only those issues raised by litigants in lawsuits before them. The obverse side of that passivity is the requirement that they *do* dispose of those lawsuits that are before them and entitled to attention. The District Court and the Court of Appeals were doubtless as chary as we are of being thrust into the middle of this controversy but were nonetheless obligated to decide the case. Unlike the District Court and the Court of Appeals, Congress has accorded to us through the Judiciary Act of 1925, 28 U. S. C. § 1254, the discretion to decline to hear a case such as this on the merits without explaining our reasons for doing so. But the existence of such discretion does not imply that it should be used as a sort of judicial storm cellar to which we may flee to escape from controversial or sensitive cases. Our Rules provide that one of the considerations governing review on certiorari is whether a Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with appli-

cable decisions of this court." Rule 19 (1)(b). In my opinion the panel decision of the Court of Appeals meets both of these tests, and I would therefore grant certiorari and hear the case on the merits.

The sharp split amongst the judges who considered this case below demonstrates that our past precedents do not conclusively address the issues central to this dispute. In the same manner that we expect considered and deliberate treatment of cases by these courts, we have a concomitant responsibility to aid them where confusion or uncertainty in the law prevails. By refusing to grant certiorari in this case, we ignore our function and responsibility in the framework of the federal court system and place added burdens on other courts in that system.

Writ large, the issue posed in this case is the extent to which a self-governing democracy, having made certain acts criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws. The Court of Appeals holds that a state university violates the First and Fourteenth Amendments when it refuses to recognize an organization whose activities both a University factfinder and the District Court found were likely to incite violations of an admittedly valid criminal statute. Neither the Court of Appeals nor respondents contend that the testimony of the expert psychologists at these hearings was insufficient to support such a finding. They appear to take instead the position that such a finding is not governed by the normal "clearly erroneous" test established in Fed. Rule Civ. Proc. 52 (a). This unusual conclusion, in itself, would seem to me to be sufficient to warrant a grant of certiorari.

But lurking behind this procedural question is one which surely goes to the heart of the inevitable clash between the authority of a State to prevent the subversion of the lawful rules of conduct which it has enacted pursuant to its police power and the right of individuals under the First and Four-

teenth Amendments who disagree with various of those rules to urge that they be changed through democratic processes. The University in this case did not ban the discussion in the classroom, or out of it, of the wisdom of repealing sodomy statutes. The State did not proscribe membership in organizations devoted to advancing "gay liberation." The University merely refused to recognize an organization whose activities were found to be likely to incite a violation of a valid state criminal statute. While respondents disavow any intent to advocate present violations of state law, the organization intends to engage in far more than political discussion. Among respondent Gay Lib's asserted purposes are the following:

> "3. Gay Lib wants to provide information to the vast majority of those who really don't know what homosexuality or bi-sexual behavior really is. Too much of the same prejudice is now directed at gay people just as it is directed at ethnic minorities.
>
> "4. Gay lib does not seek to proselytize, convert, or recruit. On the other hand, people who have already established a pattern of homosexuality when they enter college must adjust to this fact.
>
> "5. Gay Lib hopes to help the gay community to rid itself of its subconscious burden of guilt. Society imprints this self-image on homosexuals and makes adjustment with the straight world more difficult."

Expert psychological testimony below established the fact that the meeting together of individuals who consider themselves homosexual in an officially recognized university organization can have a distinctly different effect from the mere advocacy of repeal of the State's sodomy statute. As the University has recognized, this danger may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood.

The University's view of respondents' activities and respondents' own view of them are diametrically opposed. From the point of view of the latter, the question is little different from whether university recognition of a college Democratic club in fairness also requires recognition of a college Republican club. From the point of view of the University, however, the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined. The very act of assemblage under these circumstances undercuts a significant interest of the State which a plea for the repeal of the law would nowise do. Where between these two polar characterizations of the issue the truth lies is not as important as whether a federal appellate court is free to reject the University's characterization, particularly when it is supported by the findings of the District Court.

As the split among the lower court judges shows, *Healy* v. *James*, 408 U. S. 169 (1972), did not directly address these questions. There we remanded the decision of the Court of Appeals of the Second Circuit to decide whether the University's refusal to recognize a local branch of the Students for a Democratic Society was motivated by a factual conclusion that the organization would not abide by reasonable campus regulations of the sort held valid in *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077, 1089 (CA8 1969) (Blackmun, J.). Here the question is not whether Gay Lib as an organization will abide by university regulations. Nor is it really whether Gay Lib will persuasively advocate violations of the sodomy statute. Instead, the question is whether a university can deny recognition to an organization the activities of which expert psychologists testify will in and of themselves lead directly to violations of a concededly valid state criminal law.

As our cases establish from *Schenck* v. *United States*, 249 U. S. 47 (1919), in which Mr. Justice Holmes, speaking for a unanimous Court, held that the Government has a right to criminally punish words which are "used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," to *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969), some speech that has a propensity to induce action prohibited by the criminal laws may itself be prohibited. *A fortiori*, speech and conduct combined which have that effect may surely be placed off limits of a university campus without doing violence to the First or Fourteenth Amendments.

Healy was decided by the lower courts in what may fairly be described as a factual vacuum. There this Court stated that a student organization need not be recognized if such recognition is likely to incite criminal violations, but did not have to consider how that standard would be applied to a particular factual situation. No attempt had been made by the University to demonstrate that imminent lawless action was likely as a result of the speech in question, nor was there any hint that any such effort was likely to have been successful. Here, such a demonstration was undertaken, and the District Court sitting as a finder of fact concluded that petitioners had made out their case. The Court of Appeals' panel opinion, for me at least, sheds no light on why this conclusion of the District Court could be rejected. By denying certiorari, we must leave university officials in complete confusion as to how, if ever, they may meet the standard that we laid out in *Healy*.

The mathematically even division of the Court of Appeals on the petition for rehearing en banc gives some indication of the divergence of judicial views which may be expected from conscientious judges on difficult constitutional questions such as this. Our views may be no less divergent, and no less persuasive to one another, than were the views of the eight judges of the Court of Appeals. But believing as I do that we

cannot under our Rules properly leave this important question of law in its present state, I would grant the petition for certiorari.

No. 77–481. GREENE COUNTY PLANNING BOARD ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 2d Cir. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari.

No. 77–681. TAX ANALYSTS & ADVOCATES ET AL. *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 184 U. S. App. D. C. 238, 566 F. 2d 130.

No. 77–908. MADRY *v.* SOREL ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 558 F. 2d 303.

No. 77–740. GULF OIL CORP. ET AL. *v.* BOGOSIAN ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 561 F. 2d 434.

No. 77–802. NORTHWEST AIRLINES, INC. *v.* LAFFEY ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 185 U. S. App. D. C. 322, 567 F. 2d 429.

No. 77–904. SHULL *v.* DAIN, KALMAN & QUAIL, INC., ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 561 F. 2d 152.

No. 77–843. HENSLER *v.* NICHOLS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 566 F. 2d 1175.

No. 77–852. ALABAMA *v.* CANNON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 558 F. 2d 1211.

No. 77–857. PATTERSON ET AL. *v.* MCKINNON ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 568 F. 2d 930.

No. 77–892. STENSAKER SCHIFFAHRTSGES *v.* WILEY ET AL. C. A. 5th Cir. Motion of respondent Henry Wiley for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 557 F. 2d 1168.

No. 77–902. VOLKSWAGENWERK, A. G., ET AL. *v.* HEATRANSFER CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 553 F. 2d 964.

No. 77–909. BYRD ET AL. *v.* GAIN ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 558 F. 2d 553.

No. 77–945. IVY ET AL., CO-ADMINISTRATORS *v.* MICHIGAN DEPARTMENT OF THE TREASURY. Sup. Ct. Mich. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 401 Mich. 340, 258 N. W. 2d 11.

No. 77–932. BOARD OF APPEALS OF SCITUATE *v.* HOUSING APPEALS COMMITTEE ET AL. Ct. App. Mass. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari.

No. 77–951. SAVAGE ET AL. *v.* LERMA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 559 F. 2d 27.

No. 77–969. MCGARRITY *v.* UNITED STATES. C. A. 5th Cir. Motion to defer and certiorari denied. Reported below: 559 F. 2d 1386.

No. 77–5576. PHILLIPS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE POWELL would grant certiorari. Reported below: 558 F. 2d 489.

No. 77–5671. DITMARS *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 98 Idaho 472, 567 P. 2d 17.

No. 77–5687. KING *v.* TEXAS. Ct. Crim. App. Tex.;

No. 77–5715. FREEMAN *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 77–5921. GADDIS *v.* GEORGIA.. Sup. Ct. Ga. Certiorari denied. Reported below: No. 77–5687, 553 S. W. 2d 105; No. 77–5715, 556 S. W. 2d 287; No. 77–5921, 239 Ga. 238, 236 S. E. 2d 594.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 77–5695. MOORE *v.* BRIERTON, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 560 F. 2d 288.

No. 77–5901. WOODARD ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 556 F. 2d 781.

Rehearing Denied

No. 76–5325. BROWDER *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS, *ante*, p. 257;

No. 77–26. CHIN *v.* UNITED STATES, *ante*, p. 1022;

No. 77–296. HESTNES *v.* UNITED STATES, *ante*, p. 1010;

No. 77–5428. BRUCE *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p. 1017;

No. 77–5431. TYLER *v.* DYER, CLERK, CIRCUIT COURT OF PLATTE COUNTY, *ante*, p. 1036;

No. 77–5591. MCCRACKEN *v.* UNITED STATES, *ante*, p. 1037;

No. 77–5601. GREENE *v.* HOGAN, WARDEN, ET AL., *ante*, p. 1018;

No. 77–5626. DUDEK, AKA LANDERS *v.* UNITED STATES, *ante*, p. 1037;

No. 77–5652. REITER *v.* CITY OF KEENE ET AL., *ante*, p. 1019; and

No. 77–5761. HOLSEY *v.* GREIF ET AL., *ante*, p. 1038. Petitions for rehearing denied.

No. 76–6623. JOHNSTON ET AL. *v.* UNITED STATES, 431 U. S. 942, and *ante*, p. 882. Motion for leave to file second petition for rehearing denied.

No. 77–428. MOODY *v.* PAYNE, COMMISSIONER OF INSURANCE, *ante*, p. 996;

No. 77–430. OGLETREE ET AL. *v.* UNITED STATES, *ante*, p. 985;

No. 77–5533. KURZ ET UX. *v.* MICHIGAN ET AL., *ante*, p. 972;

No. 77–5605. BRAUDRICK *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p. 987; and

No. 77–5622. STOCKING *v.* MARSH ET AL., *ante*, p. 999. Petitions for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

No. 72–397. BONELLI CATTLE CO. ET AL. *v.* ARIZONA ET AL., 414 U. S. 313; and

No. 77–231. NACHBAUR *v.* NATIONAL LABOR RELATIONS BOARD ET AL., *ante*, p. 955. Motions for leave to file petitions for rehearing denied.

No. 77–5574. STODDARD *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, *ante*, p. 987. Motion for leave to file petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

FEBRUARY 22, 1978

Miscellaneous Order

No. A–695. IN RE NORTHERN. This application for stay of the mandate of the Tennessee Court of Appeals, Middle Section, was presented to MR. JUSTICE STEWART as Circuit Justice on February 16, 1978, and referred by him to the Conference. Whereupon the Court requested the State to file an expedited response to the application by noon, February 21, 1978. The response was received in due course and a special conference was called to consider the matter. It is hereby ordered that the application be denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent and would grant the stay.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1090 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* McRAE ET AL.

ON APPLICATION FOR STAY

No. A–46. Decided July 20, 1977

In view of this Court's Rule 58 permitting a petition for rehearing to be granted only by a Justice who concurred in the initial judgment or decision, MR. JUSTICE MARSHALL abstains from acting on an application for stay, pending a petition for rehearing, of the Court's order vacating the District Court's judgment and remanding for further consideration in light of *Maher* v. *Roe*, 432 U. S. 464, and *Beal* v. *Doe*, 432 U. S. 438, since he dissented in both of those cases.

MR. JUSTICE MARSHALL, Circuit Justice.

Section 209 of Pub. L. 94–439, 90 Stat. 1434, generally prohibits the Secretary of Health, Education, and Welfare from expending federal Medicaid funds for abortions. In the instant case, the United States District Court for the Eastern District of New York enjoined operation of the law. On June 29, 1977, this Court entered the following order:

> "The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of New York for further consideration in light of *Maher* v. *Roe*, 432 U. S. 464 (1977), and *Beal* v. *Doe*, 432 U. S. 438 (1977)." See 433 U. S. 916.

This is an application for

> "a stay of execution of this Court's vacatur of the district court's injunction of Section 209 of Public Law 94–439 (the 'Hyde Amendment') and/or, in the alternative for a stay as follows:

"1. A stay, pending conclusion of the district court's reconsideration of this case in light of *Maher* v. *Roe,* 432 U. S. 464 (1977), and *Beal* v. *Doe,* 432 U. S. 438 (1977), as ordered by this Court on [June] 29, 1977 in this case. A stay is necessary to prevent irreparable harm during the remand proceedings in the district court and to assure full and effective presentation to and consideration by the district court of the issues left open by this Court's remand order; and/or in the alternative,

"2. A stay, pending the timely filing and disposition in this Court of a petition for rehearing pursuant to Rule 59 (2) of this Court."

It is obvious that in essence applicants seek to have this Court reconsider its order vacating the District Court's judgment, and seek an injunction to protect them during the consideration of a petition for rehearing. It is also clear that the controlling legal precedents bearing on whether to grant rehearing are *Maher* v. *Roe,* 432 U. S. 464 (1977), and *Beal* v. *Doe,* 432 U. S. 438 (1977). I dissented in both of those cases. This Court's Rule 58 governing rehearings provides: "A petition for rehearing . . . will not be granted, *except at the instance of a justice who concurred in the judgment or decision* and with the concurrence of a majority of the court." (Emphasis added.) For that reason I have decided to abstain on this application and suggest that the application be made to one of the Justices "who concurred in the judgment or decision" in *Maher* and *Beal.*

DIVANS *v.* CALIFORNIA

ON APPLICATION FOR STAY

No. A–91. Decided July 28, 1977

Application for stay of applicant's second state criminal trial pending the filing and disposition of a petition for certiorari in this Court is denied, where the first trial resulted in a mistrial upon applicant's motion because of a prosecutorial error found by the trial judge to be of the kind not intentionally committed to provoke a mistrial request.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant has requested that I stay the commencement of his second trial in the Superior Court of Santa Clara County, Cal., pending the filing and disposition of a petition for certiorari here. His first trial aborted as a result of the trial judge's declaration of a mistrial upon applicant's motion. I have determined the application should be denied.

Any order granting a mistrial at the behest of a defendant in a criminal case is typically based upon error or misconduct on the part of other counsel or the court. In order to elevate such a typical order into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial.

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' *United States* v. *Jorn*, [400 U. S.,] at 485 threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the

> prosecution a more favorable opportunity to convict' the defendant. *Downum* v. *United States*, 372 U. S., at 736." *United States* v. *Dinitz*, 424 U. S. 600, 611 (1976).

The finding of the Superior Court that the prosecutorial error which resulted in the original mistrial in this case was of the former and not the latter kind convinces me that this Court would not grant certiorari to review the applicant's double jeopardy claim.

PACIFIC UNION CONFERENCE OF SEVENTH-DAY ADVENTISTS ET AL. *v.* MARSHALL ET AL.

ON APPLICATION FOR STAY

No. A–81. Decided August 2, 1977

Application by institutional bodies of Seventh-Day Adventist Church for stay of the District Court's discovery orders, pending applicants' filing of a petition for certiorari in this Court for review of the District Court's order denying applicants' motion for summary judgment in respondent Secretary of Labor's action against them to enforce the equal pay provisions of the Fair Labor Standards Act, wherein applicants contended that the First Amendment principle of separation of church and state forbids application of such provisions to them, is denied, where it does not appear that at this stage of the case certiorari would be granted to review the Court of Appeals' order refusing to grant relief by way of mandamus against the District Court's orders.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants are conferences and other institutional bodies of the Seventh Day Adventist Church which operates some 150 religious schools and colleges in California. They request that I stay enforcement of three discovery orders entered by the District Court for the Central District of California pending their filing of a petition for certiorari in this Court. The Court of Appeals for the Ninth Circuit refused to grant relief by way of mandamus against the District Court's discovery orders and the District Court's order denying applicants' motion for summary judgment. The action in which these orders were entered was brought by respondent Secretary of Labor against applicants to enforce the equal pay provisions of the Fair Labor Standards Act, 29 U. S. C. § 206 (d). The District Court, in denying applicants' motion for summary judgment, noted that the Secretary was seeking to apply these provisions only to the lay employees of the applicants and not to their clergy.

Applicants contend that the principle of separation between church and state embodied in the First Amendment to the United States Constitution forbids Congress from applying to them this statute which requires in substance that men and women be paid equally for the same work, because such application would be contrary to their religious principles. They claim that even the presence on church school premises of representatives of the Secretary, pursuant to the District Court's authorization of discovery, for the purpose of examining payroll records in aid of the prosecution of this lawsuit is an "intrusion" forbidden by that Amendment.

While I am not prepared to say that four Members of this Court would not vote to grant certiorari to consider such a claim if it were squarely presented by a final order or decision of the District Court affirmed by the Court of Appeals, see *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963), I do not think certiorari would be granted to review the order of the Court of Appeals denying mandamus at this stage of the case. I have therefore decided to deny the application for a stay without attempting to inquire further as to what irreparable injury would be suffered by applicants in the event of such denial.

The order denying summary judgment which the applicants seek to have reviewed here, although they do not request that it be "stayed," is not even appealable to the Court of Appeals under 28 U. S. C. § 1291, to say nothing of being directly appealable to this Court. Because it is not a "final order or decision" within the meaning of that section, it is reviewable only pursuant to the provisions for interlocutory appeal set forth in 28 U. S. C. § 1292 (b). These provisions require as a first step in that procedure that the District Court certify the question as appropriate for interlocutory appeal. The District Court, however, in this case declined to make such a certification.

In their petition to the Court of Appeals, applicants

requested that court "to require respondent Court to dismiss said action or to enter summary judgment for defendants therein." So far as I am aware, such relief is not available, pursuant to statute or otherwise, in the Court of Appeals. Since the Court of Appeals issued no opinion in this matter, it could have construed the petition as a request to order the District Court to certify the question for interlocutory review. It would necessarily be this order of the Court of Appeals denying the requested relief which would be presented for review in applicants' petition for certiorari to that court.

Before any First Amendment claim would be reached upon such review, it would be necessary for this Court to decide that the Court of Appeals had authority by a writ of mandamus to require the District Court to certify a question for interlocutory appeal, and that it abused its discretion in refusing to do so in this case. While there have been differing views expressed by the Court of Appeals as to the availability of mandamus to require certification under § 1292 (b), the order of the Court of Appeals for the Ninth Circuit in this case does not seem to me to present the question in a way which would warrant review by this Court. The Court of Appeals did not indicate whether the writ was refused because of lack of authority, or by reason of that court's exercise of its discretion even though the authority was thought to exist. Shrouded as it is in these vagaries of certification procedure pursuant to 28 U. S. C. § 1292 (b), the First Amendment claim would not be squarely presented in any petition for certiorari at this time.

Applicants' request for a stay of the discovery orders pending review here of the Court of Appeals' refusal to interfere with them by mandamus stands on a somewhat different footing than the request to review the District Court's denial of summary judgment. While discovery orders are not themselves appealable, in extraordinary circumstances interlocutory review of them may be had by way of mandamus. *Schlagen-*

hauf v. *Holder*, 379 U. S. 104 (1964); *Kerr* v. *United States District Court*, 426 U. S. 394 (1976). In *Schlagenhauf*, however, where this Court reversed a denial of mandamus by the Court of Appeals, it was careful to point out that the case was the first opportunity it had been afforded to construe the provisions of Fed. Rule Civ. Proc. 35 (a).

In the present case applicants sought mandamus in the Court of Appeals for the Ninth Circuit to review at least the first of the discovery orders which they request that I stay.* The Court of Appeals declined to issue the writ. Unlike the situation in *Schlagenhauf, supra*, the Court of Appeals for the Ninth Circuit was not presented with any novel interpretation or first-impression question concerning the discovery rules themselves; there seems to be no question that if respondent is correct as to the underlying merits of the dispute over the applicability of the equal pay provisions, the discovery ordered by the District Court was entirely orthodox. Applicants' objection to the discovery orders is therefore impossible to separate from their underlying claim that they should not have been required to defend against the Secretary's action beyond the summary judgment stage. The discovery orders do require a degree of physical intrusion into applicants' records, but so long as that intrusion is within the normal bounds of discovery, I do not think this Court would grant certiorari to review the Court of Appeals' refusal of relief from that discovery by way of mandamus.

While *Schlagenhauf, supra*, opened the door a crack to per-

*After the writ had been denied by the Court of Appeals, the District Court on July 18 issued a discovery order amounting to a reinstatement of its original order of June 6. The Solicitor General contends that the last order, issued July 20, involves a substantially different phase of the litigation and is not properly before this Court, not having been considered by the Court of Appeals. In view of my conclusion that a stay is inappropriate under the circumstances disclosed by this application, if the Solicitor General's argument is factually correct it amounts to an additional reason for denying the stay.

mit review of a discovery order under the special circumstances of that case, to grant such review here would permit an application for review of a discovery order to serve in effect as a vehicle for interlocutory review of the underlying merits of the lawsuit. The policy against piecemeal interlocutory review other than as provided for by statutorily authorized appeals is a strong one, see *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976). I think that this Court would be disposed to review applicants' constitutional claims, if at all, only after a full record is compiled in the course of the present litigation in the District Court followed by statutory appeal to the Court of Appeals.

The application to stay the orders of the District Court entered on June 6, July 18, and July 20, respectively, are accordingly

Denied.

BEAME, MAYOR OF NEW YORK CITY, ET AL. *v.* FRIENDS OF THE EARTH ET AL.

ON APPLICATION FOR STAY

No. A–99 (76–1718). Decided August 5, 1977

Application by New York City and city officials for stay, pending this Court's determination of their petition for certiorari, of enforcement of the Court of Appeals' judgment directing the District Court to take steps to ensure that the Transportation Control Plan for the Metropolitan New York Area under the Clean Air Act "will be promptly implemented," is denied, where it does not appear either that there is a balance of irreparable harm in applicants' favor or that four Members of this Court will vote to grant certiorari.

See: 552 F. 2d 25.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicants, the city of New York (City) and several of its officials, seek a stay of enforcement of a judgment of the United States Court of Appeals for the Second Circuit pending determination by this Court of their petition for certiorari. In its judgment, entered January 18, 1977, the Court of Appeals directed the District Court to take steps to ensure that the Transportation Control Plan for the Metropolitan New York Area (Plan) "will be promptly implemented." *Friends of the Earth* v. *Carey*, 552 F. 2d 25, 39. Pursuant to this judgment, the District Court in February ordered applicants to begin implementation of four pollution control strategies, involving reductions in business district parking, taxicab cruising, and daytime freight movements, and the imposition of tolls on certain bridges into Manhattan. Applicants moved for a stay of this directive in the District Court and the Court of Appeals; both motions were denied. Applicants then sought a stay from me, and oral argument was heard in chambers. For the reasons that follow, I must deny the application for a stay.

I

This case is the most recent skirmish in a long legal battle. In April 1973, the State of New York (State) submitted to the Administrator of the United States Environmental Protection Agency (EPA) the Plan here at issue, pursuant to § 110 (a)(1) of the Clean Air Act (Act), added by the Clean Air Amendments of 1970, 84 Stat. 1680, 42 U. S. C. § 1857c–5 (a)(1). The Administrator approved the Plan, and his approval was then challenged in court. The Second Circuit upheld the validity of the Plan in all material respects in *Friends of the Earth* v. *EPA*, 499 F. 2d 1118 (1974) (*Friends I*).

Soon after the *Friends I* decision, respondents filed the instant action, a citizen suit brought pursuant to § 304 of the Act, 84 Stat. 1706, 42 U. S. C. § 1857h–2. They sought to compel applicants to implement the four pollution control strategies referred to above. The District Court denied this request for enforcement of the Plan, and the Court of Appeals reversed, *Friends of the Earth* v. *Carey*, 535 F. 2d 165 (1976) (*Friends II*). The District Court then entered partial summary judgment for respondents in April 1976, but in July it significantly modified its judgment, ruling that the City did not have to enforce the Plan against any polluter other than itself. This holding was purportedly based on the Tenth Amendment as interpreted by this Court in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), and by lower courts in the cases consolidated in *EPA* v. *Brown*, 431 U. S. 99 (1977) (*per curiam*).

In January 1977, the Court of Appeals again reversed, *Friends of the Earth* v. *Carey*, 552 F. 2d 25 (*Friends III*), giving two alternative rationales for its holding that the April 1976 partial summary judgment should be reinstated. First, the court reasoned that applicants were precluded by § 307 (b)(2) of the Act, 84 Stat. 1708, 42 U. S. C. § 1857h–5 (b)(2), from making their constitutional attack on the Plan

as a defense to a civil enforcement proceeding. Such an attack could only have been made, the court stated, in a petition for review of the EPA Administrator's approval of the Plan in 1973—a time when the City was supporting the Plan. Second, even assuming no statutory preclusion, the court held that the District Court's Tenth Amendment analysis was in error, because the State here promulgated its own Plan, which thus represented its own policy choices. In the cases involved in *EPA* v. *Brown*, *supra*, by contrast, the EPA had promulgated plans for the States, pursuant to its mandate to do so whenever a State fails to submit a plan or submits an inadequate plan, see § 110 (c)(1) of the Act, 42 U. S. C. § 1857c–5 (c)(1). The Court of Appeals concluded that the federal intrusion into state affairs is much more limited in a case in which the Federal Government sets only goals and the State decides for itself how to reach them. Applicants' certiorari petition seeks review in this Court of both grounds for the Court of Appeals' holding.

II

In deciding whether to grant a stay pending disposition of a petition for certiorari, the Members of this Court use two principal criteria. First, "a Circuit Justice should 'balance the equities' . . . and determine on which side the risk of irreparable injury weighs most heavily." *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers). Second, assuming a balance of equities in favor of the applicant, the Circuit Justice must also determine whether "it is likely that four Members of this Court would vote to grant a writ of certiorari." *Id.*, at 1310. The burden of persuasion as to both of these issues rests on the applicant, and his burden is particularly heavy when, as here, a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals. See *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163–164 (1923); *Board of Education* v. *Taylor*, 82 S. Ct. 10, 10–11 (1961) (BRENNAN, J., in chambers); cf.

Holtzman v. *Schlesinger, supra,* at 1314–1315 ("great weight" given to decision by Court of Appeals to grant stay).

Applicants have not met their burden of showing a balance of hardships in their favor. Were the injury to the City from implementation of the Plan as severe as applicants now claim, one would think that they would have filed their petition for certiorari with dispatch, so that this matter could have been resolved by the entire Court prior to the June 29, 1977, conclusion of the 1976 Term. Instead, applicants waited the maximum time, 90 days, after the Court of Appeals denied rehearing and rehearing en banc before filing their petition on June 2, 1977. In the interim, they did not seek any stay of the Court of Appeals' judgment and the ensuing District Court order; they first sought such a stay in the District Court a full 20 days after filing their certiorari petition. The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm.

The allegations themselves are not compelling. The affidavits of City and Chamber of Commerce officials are offered to indicate some adverse economic impact on the City from implementation of the entire Plan. The Plan, however, is to be phased in over several months, and the affidavits and accompanying submissions contain little, if any, specific information as to the harm to be expected over the two months remaining until the entire Court can act on applicants' petition.

Respondents contend, moreover, that there will be some economic benefits from implementation of the Plan (*e. g.,* faster delivery times for trucks that currently have to maneuver around illegally parked cars, enhanced attractiveness of the City to businesses and tourists who currently avoid it because of its traffic, air pollution, and noise). Thus the economic-impact factor does not weigh entirely in applicants' favor. In addition, any adverse economic effect of the Plan's

partial implementation over the next two months is balanced to some considerable extent by the irreparable injury that air pollution may cause during that period, particularly for those with respiratory ailments. See *Friends II*, 535 F. 2d, at 179–180 (noting that Congress made the decision to put "the lungs and health of the community's citizens" ahead of some "inconvenience and expense to . . . governmental and private parties" and that the City's carbon monoxide levels are "over five times the federal health standards"). Finally, if specific aspects of the Plan prove to be onerous or unworkable, applicants are free at any time to seek an accommodation with EPA and a modification of the District Court's order.

III

I have therefore concluded that the "balance of equities" does not weigh in applicants' favor. Even if it did, however, I am not persuaded that four Justices of this Court would vote to grant a writ of certiorari in this matter. The Court of Appeals gave alternative rationales for its result, and its opinion as to each appears facially correct. Applicants are thus not "likely to prevail on the merits," *Holtzman* v. *Schlesinger*, *supra*, at 1311; see *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers) (requiring "significant possibility of reversal" in order to grant stay).

Judicial consideration of applicants' constitutional claim appears precluded at this point by the language of § 307 (b)(2) of the Act, 42 U. S. C. § 1857h–5 (b)(2). While this Court has granted certiorari in *Adamo Wrecking Co.* v. *United States*, 430 U. S. 953 (1977), in part to consider the validity of § 307 (b)(2)'s preclusion of defenses in a criminal context, applicants do not argue that any analogous considerations would make § 307 (b)(2) invalid as applied in this civil case. Applicants' Tenth Amendment contentions are based on alleged similarities between this case and *EPA* v. *Brown*, *supra*,

but the fact that New York promulgated its own Plan makes this case significantly different from *Brown* and, in my view, renders insubstantial the Tenth Amendment issue here.

Finding neither a balance of irreparable harm in favor of applicants nor a likelihood that four Justices will vote to grant a writ of certiorari, I am compelled to deny the application for a stay.

COMMODITY FUTURES TRADING COMMISSION ET AL. *v.* BRITISH AMERICAN COMMODITY OPTIONS CORP. ET AL.

ON APPLICATION TO VACATE STAYS

No. A–86 (77–96). Decided August 8, 1977

The Court of Appeals entered stays of mandate preventing enforcement of a certain regulation of the Commodity Futures Trading Commission, pending this Court's disposition of petitions for certiorari by respondents, a commodity options dealers association and several of its members. The Commission's application to vacate the stays is denied, since it appears that the risk of harm from deferring enforcement of the regulation for a few more months is outweighed by the potential injury to respondents if the regulation were allowed to go into effect, and since four Justices conceivably will vote to grant certiorari.

MR. JUSTICE MARSHALL, Circuit Justice.

The Solicitor General, on behalf of the Commodity Futures Trading Commission and its members, has applied to me as Circuit Justice to vacate stays of mandate entered by the United States Court of Appeals for the Second Circuit pending applications for certiorari by the respondents herein. The stays have the consequence, for their limited duration, of preventing a Commission regulation that has yet to be enforced, Rule 32.6, 17 CFR § 32.6 (1977), from going into effect. The regulation, promulgated under the Commodity Futures Trading Commission Act of 1974 (CFTA), 88 Stat. 1389, 7 U. S. C. §§ 1–22 (1970 ed. and Supp. V), would require commodity options dealers to segregate in special bank accounts 90% of the payments made by each of their customers until such time as the customer's rights under his options are exercised or expire. Having examined the written submissions of the Solicitor General and the responses thereto, I have concluded that this case does not present the exceptional circumstances required to justify vacation of the stays.

I

Prior to the enactment of CFTA, trading in options on certain agricultural commodities was prohibited under § 4c of the Commodity Exchange Act, 49 Stat. 1494, 7 U. S. C. § 6c, but options transactions in other commodities were wholly unregulated. Unsound and fraudulent business practices developed with respect to the unregulated options, and at least one major dealer went bankrupt, causing substantial losses to investors. In order to prevent such abuses in the future, CFTA created the Commission as an independent regulatory body and gave it the power to prohibit or regulate options transactions in the previously unregulated commodities. See 7 U. S. C. § 6c (a) (1970 ed., Supp. V).

Pursuant to this authority, the Commission immediately adopted an antifraud rule, and on November 24, 1976, after informal rulemaking proceedings, the Commission promulgated a comprehensive set of regulations that included the segregation requirement at issue in this application. The latter set of regulations also included provisions requiring options dealers (1) to be registered with the Commission; (2) to maintain certain minimum amounts of working capital; and (3) to provide customers with disclosure statements setting forth information about commissions and fees and explaining the circumstances under which customers would be able to make a profit. The segregation requirement was to go into effect on December 27, 1976; the other regulations were to take effect variously on December 9, 1976, and January 17, 1977.

Respondents, the National Association of Commodity Options Dealers (NASCOD) and a number of its members, brought suit in the United States District Court for the Southern District of New York, seeking pre-enforcement review of the November 24 regulations. The Commission defended the segregation requirement as a reasonable means of protecting investors in the event that a dealer holding

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options on their behalf becomes insolvent or otherwise unable to execute the options; presumably, the investors could at least recoup most of their initial outlay from the segregated fund. But respondents argued that the rule would drive them out of business;* was unnecessary in light of other existing safeguards; and might not even be effective in facilitating return of customers' investments should a dealer go bankrupt.

The District Court concluded that the segregation rule threatened respondents with irreparable harm and that respondents had a reasonable likelihood of success in having it overturned as arbitrary and capricious. Accordingly, on December 21, 1976, six days before the rule was to go into effect, the District Court preliminarily enjoined its enforcement. At the same time it granted summary judgment in favor of the Commission as to the remainder of respondents' claims, and the other regulations went into effect as scheduled.

On cross-appeals, the Court of Appeals reversed the order insofar as it granted a preliminary injunction, holding "that the Commission's decision to impose a segregation requirement was a reasonable exercise of its discretion in an effort to protect the public," and affirmed the District Court in all other respects. *British American Commodity Options Corp.* v. *Bagley*, 552 F. 2d 482, 490–491 (1977). This decision was

*Respondents deal in "London options," which are options on futures contracts traded on various exchanges in London, England. American customers make cash payments to individual respondents, in amounts equal to the sum of the "premium" (the price charged for the option in London) and the respondent's commission and fees. The respondents then forward the premium to a "clearing member" of the London exchange, who purchases the option for the account of the respondents. When the customer wishes to exercise the option, he informs the respondent dealer, who in turn informs the clearing member in London.

The customers' cash payments can be segregated or used to pay the premiums in London, but not both. Since respondents apparently cannot supply the additional cash from internal sources, they would have to borrow. They claim that they would be unable to obtain such loans and would consequently be forced out of business.

announced on April 4, 1977, and rehearing was denied on June 6, 1977. Respondents then moved the Court of Appeals, under 28 U. S. C. § 2101 (f) and Fed. Rule App. Proc. 41 (b), to stay its mandate pending applications to this Court for certiorari. On June 14, 1977, the members of the panel that had decided the case granted stays to respondents NASCOD, British American Commodity Options Corp. (British American), and Lloyd, Carr & Co. (Lloyd, Carr), conditional in the cases of British American and Lloyd, Carr on the posting of bonds in the amounts suggested in their motion—$250,000 for British American and $100,000 for Lloyd, Carr. On June 15, the Commission moved the Court of Appeals to reconsider the amounts of the bonds set in the June 14 order, but this motion was denied by the panel on June 24. On July 8 the panel granted stays of mandate to four additional NASCOD members, again conditional on posting of security, and this time the court ordered amounts greater than had been suggested with respect to three of the four firms. The instant application to vacate the stays entered on June 14 and July 8 was filed on July 25.

II

There is no question as to the power of a Circuit Justice to dissolve a stay entered by a court of appeals. See, *e. g.*, *New York* v. *Kleppe*, 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers); *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers); *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) (Black, J., in chambers). "But at the same time the cases make clear that this power should be exercised with the greatest of caution and should be reserved for exceptional circumstances." *Holtzman* v. *Schlesinger*, *supra*, at 1308. Since the Court of Appeals was quite familiar with this case, having rendered a thorough decision on the merits, its determination that stays were warranted is deserving of great weight, and should be overturned only if the court can be said to have abused its discretion. See, *e. g.*, 414

U. S., at 1305; *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163–164 (1923).

It is well established that the principal factors to be considered in evaluating the propriety of a stay pending application for certiorari and, correspondingly, whether to vacate such a stay granted by a court of appeals, are the "balance of equities" between the opposing parties, and the probability that this Court will grant certiorari. See, *e. g.*, *Beame* v. *Friends of the Earth*, *ante*, p. 1310 (MARSHALL, J., in chambers); *Holtzman* v. *Schlesinger*, *supra*, at 1308–1311; *Meredith* v. *Fair*, *supra*. The relative weight of these factors will, of course, vary according to the facts and circumstances of each case.

As to the equities here, it is important to note that the stays entered by the Court of Appeals merely preserve the regulatory status quo pending final action by this Court. Options dealers were never in the past required to segregate customer payments, and the rule in question here has yet to be enforced. If and when the regulation does go into effect, respondents may well be driven out of business, and on this basis the District Court expressly found that respondents are threatened with irreparable harm.

Arrayed against this irreparable harm to respondents is the contention of the Solicitor General that the segregation requirement must be placed into effect immediately, in order to protect customers from loss in the event that respondents become insolvent or unable to execute their customers' options during the time before this Court disposes of the case. The Solicitor General argues, quite correctly of course, that the Commission enacted the regulation because it felt the public needed the protection, and the Court of Appeals upheld the Commission's judgment as reasonable.

But the same panel which sustained the regulation also deemed it appropriate to enter stays of mandate. Undoubtedly, the court recognized that during the time in which the

case is pending before this Court customers will be guarded at least to some degree by the other Commission regulations, which were not enjoined and which have already gone into effect. More importantly, the court secured interim protection for investors by ordering bonds to be posted by respondents. Although the Solicitor General now complains that the bonds are not large enough to guarantee adequate insurance against loss, and that nothing short of the amounts that would have to be segregated under the terms of the regulation will suffice, these same arguments were made to, and rejected by, the Court of Appeals when it granted the stays and when it denied the Commission's motion to reconsider the amount of bond which had been set for respondents British American and Lloyd, Carr. No significant change in circumstances is offered to justify re-evaluation of the Court of Appeals' determination that the posted sums are adequate. See *Jerome* v. *McCarter,* 21 Wall. 17, 28–31 (1874). With the case in this posture, the risk of harm from putting off enforcement of the regulation for a few more months certainly appears to be outweighed by the potential injury to respondents if the regulation were allowed to go into effect.

If I were certain that this Court would not grant certiorari, the fact that the balance of equities clearly favors respondents would not be a sufficient justification for leaving the stays in force. But, without in any way expressing my own view as to the merits, it is not entirely inconceivable to me that four Justices of this Court will deem respondents' attack on the segregation requirement worthy of review. Although the question of whether that requirement is arbitrary and capricious is rather fact intensive, and is thus the type of matter that is normally appropriate for final resolution by the lower courts, see *New York* v. *Kleppe, supra,* at 1311, it does appear that the regulation would fundamentally alter the ground rules for doing business in a substantial industry, with potentially fatal consequences for a number of the firms currently

in the trade, and this case presents the first opportunity for this Court to pass on action taken by the recently created Commission.

In these circumstances, I cannot say that the Court of Appeals abused its discretion by staying its mandate. The application to vacate the stays must accordingly be denied.

It is so ordered.

RICHMOND *v.* ARIZONA

ON APPLICATION TO SUSPEND ORDER DENYING CERTIORARI OR TO STAY EXECUTION

No. A–108 (76–6720). Decided August 8, 1977

Application for suspension of this Court's order denying certiorari on applicant's petition attacking constitutionality of Arizona death penalty statute, or for a stay of execution of such penalty against applicant, pending action on his petition for rehearing, is denied, where it is unlikely that the petition for rehearing will be granted.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Willie Lee Richmond requests either a suspension of our order denying certiorari, 433 U. S. 915 (1977), or a stay of execution pending action on his petition for rehearing. The Supreme Court of Arizona has fixed September 14, 1977, as the date of execution of applicant and has denied his application for a stay. Because the petition for rehearing seems to me to demonstrate nothing that would indicate any reasonable likelihood of this Court's reversing its previous decision and granting certiorari, I have decided to deny the application.

On appeal of his conviction and death sentence to the Arizona Supreme Court, applicant argued that the Arizona capital punishment statute, Ariz. Rev. Stat. Ann. § 13–454 (Supp. 1973), was unconstitutionally ambiguous in not specifically limiting mitigating circumstances to the four factors enumerated in § 13–454 (F). After the Arizona Supreme Court ruled that only the enumerated factors could be taken into account, 114 Ariz. 186, 560 P. 2d 41 (1976), applicant moved for a rehearing on the ground that the statute as so limited failed to allow consideration of the character of the defendant in determining whether the death penalty should be imposed. While the statute includes in its list of miti-

gating circumstances significant impairment of a defendant's capacity to tell right from wrong or to conform to the law, it fails to take into account other factors such as age, lack of prior criminal history, and intellectual level. Rehearing was denied.

Applicant renewed his constitutional attack against the Arizona death penalty statute in his petition for certiorari before this Court, again on the ground that it failed to allow consideration of the character and record of the individual offender. While specifically noting that the statute does not allow consideration of the defendant's age or prior criminal history, the applicant did not suggest that such factors were relevant in his case. Certiorari was denied by this Court on June 27, 1977, with JUSTICES BRENNAN and MARSHALL dissenting.

Applicant in his petition for rehearing here continues his attack on Arizona's failure to adopt a more expansive list of mitigating circumstances. Applicant argues that our grant of certiorari in *Bell* v. *Ohio*, 433 U. S. 907 (1977), is an intervening circumstance that demands as a matter of "justice and judicial economy" that we also grant certiorari in his case. Certiorari was granted in *Bell* v. *Ohio*, however, on the same day in which we denied certiorari in this case. Applicant's assertion attributes a degree of irrationality to the Court in simultaneously granting Bell's petition and denying his in which I cannot join. In my opinion, the cases are quite different. The Ohio and Arizona death penalty statutes are similar in that their lists of mitigating circumstances do not include such factors as age and lack of prior criminal convictions, which are included in the Florida statute approved in *Proffitt* v. *Florida*, 428 U. S. 242 (1976). Applicant, unlike Bell, however, does not allege that he would be aided by an expansion of the statutory list of mitigating circumstances. The petition in *Bell* pointed out that the defendant was 16 at the time of the penalty trial, had a low IQ, was considered

emotionally immature and abnormal, had cooperated with the police, and had no significant history of prior criminal activity. What evidence is alluded to in the applicant's papers does not suggest that any of the factors that applicant contends must be considered in imposing capital punishment would be relevant to his case. There is no indication in any of the applicant's papers as to his age at either the time of the offense or trial. It is doubtful, particularly after our grant of certiorari in *Bell*, that applicant would have failed to include this fact in his petition for rehearing if he had been a minor at these times. The record also indicates that applicant had previously been convicted of kidnaping a victim at knifepoint. The only mitigating ground apparently suggested by applicant before the Arizona courts was psychological testimony characterizing applicant as a sociopath.

Applicant raises a second argument in his petition for rehearing that was not raised either before the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth, and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in *Proffitt*.

In summary, I conclude that there is no reasonable likelihood that applicant's petition for rehearing would be granted by the full Court. I am fortified in this view by consultation with my colleagues. Applicant's argument as to mitigating factors was before us in his initial petition for certiorari. He does not suggest any new reason why our initial decision to deny certiorari was wrong. Applicant's jury contention appears to have been rejected in *Proffitt*. A motion for rehearing of an order denying certiorari does not automatically suspend the order during the Term, unlike a petition for rehearing after full consideration of the case on the merits. The petitioner must apply to an individual Justice for a sus-

pension of the order denying certiorari. Cf. this Court's Rules 25 (2) and 59 (2). The question under such circumstances must be whether there is any reasonable likelihood of the Court's changing its position and granting certiorari. As elaborated above, there does not seem to me to be any such likelihood here. The application for a suspension of our order denying certiorari or, in the alternative, a stay of execution is therefore denied.

NATIONAL SOCIALIST PARTY OF AMERICA ET AL. *v.* VILLAGE OF SKOKIE

ON APPLICATION FOR STAY

No. A–162. Decided August 26, 1977

Application for stay of Illinois trial court's injunction preventing applicants from displaying swastika "in the course of a demonstration, march, or parade," pending the Illinois Supreme Court's review of the Appellate Court's decision modifying the original injunction and upholding the above portion, is denied, where it does not appear that the controversy will become moot pending appeal or that the Illinois courts failed to comply with this Court's order for "immediate appellate review," and where a stay would be tantamount to a decision on the merits in applicants' favor.

MR. JUSTICE STEVENS, Circuit Justice.

Following the entry of this Court's order of June 14, 1977, 432 U. S. 43, the Illinois Appellate Court reviewed and substantially modified the injunction entered against applicants by the Circuit Court of Cook County, upholding only that portion of the injunction that prevented applicants from displaying the swastika "in the course of a demonstration, march or parade." Thereafter, the Illinois Supreme Court scheduled an expedited review of the Appellate Court's decision, but it denied an application for a stay of the injunction pending that review. On August 18, 1977, a similar application was submitted to me as Circuit Justice. I requested a response from the village of Skokie and have now decided to deny the application.

Applicants have not demonstrated that a stay is necessary to protect this Court's appellate jurisdiction. There appears to be no danger that the controversy will become moot while the appeal is pending in the Illinois Supreme Court. Nor have applicants demonstrated that the Illinois courts have failed to comply with the "immediate appellate review" requirement of

this Court's order of June 14, 1977. After the entry of that order, both the Illinois Appellate Court and the Illinois Supreme Court expedited their consideration of the case, and I am confident that the Illinois Supreme Court will make its decision without any unnecessary delay. Even "immediate" appellate review of an important and difficult issue necessitates appropriate deliberation. Considering these facts, the fact that the injunction has been substantially modified, and the fact that the entry of the stay would be tantamount to a decision on the merits in favor of the applicants, it seems clear that a stay should not be granted.

The application submitted to me as Circuit Justice is denied.

WISE ET AL. *v.* LIPSCOMB ET AL.

ON APPLICATION FOR STAY

No. A–149. Decided August 30, 1977

Application for stay of the Court of Appeals' judgment directing the District Court to require the exclusive use of single-member districts in the election of the Dallas, Tex., City Council, and for recall of the mandate, pending review by this Court, is granted, where it appears that there is a reasonable probability that at least four Members of this Court will vote to grant certiorari, and that if a stay is not granted the issues would become moot and the incumbent City Council's capacity to function effectively might be impaired.

See: 551 F. 2d 1043.

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment and recall of the mandate of the United States Court of Appeals for the Fifth Circuit. That judgment directs the District Court for the Northern District of Texas to require the exclusive use of single-member districts in the election of the Dallas City Council. Applicants, the Mayor and City Council of Dallas, contend that any redistricting pending review by this Court could have the effect of mooting the case and defeating this Court's jurisdiction.

I

Before 1975 the 11 members of the Dallas City Council were elected by an exclusively at-large system of voting. Eight places on the ballot were reserved for candidates who resided in one of the city's eight residential districts. Three seats, including the Mayor's, were open to candidates regardless of residence. Voting for all 11 seats was citywide. For many years Council elections have been nonpartisan, involving slating groups rather than political parties. Electoral success has depended in major part upon support of one such group, the Citizens' Charter Association.

Plaintiffs representing Negro citizens of Dallas challenged this election system in 1971. Certain Mexican-Americans intervened, but were dismissed from the case for failure to respond to interrogatories. In 1975, the District Court concluded that the at-large election system unconstitutionally diluted the vote of Dallas' Negro citizens. The court rested this conclusion on findings dealing with the geographic concentration of Negroes within the city, the effect of slating groups, and the city's history of *de jure* discrimination.

Instead of formulating its own districting plan, the court afforded the City Council an opportunity to enact a valid plan. The Council duly adopted an ordinance that provides for election of a Council member from each of eight single-member districts, the remaining three to be elected from the city at large. After careful examination of this plan, the District Court approved it. The court observed that single-member districts generally are preferable, but concluded that several facts weighed in favor of the city's new system. First, the court noted that any plan which did not consider the effect on Mexican-American voters might itself be constitutionally suspect. Indeed, detailed consideration of the plan's effect upon those voters, who were more geographically dispersed than Negro citizens, convinced the District Court that their electoral power would be enhanced. Second, the new plan permitted some citywide representation in a body that functioned as a legislature for the entire city. At-large voting in Dallas dated back to 1907, and there was no showing that its use in the new plan would have adverse effects on any minority. The court found a recent marked improvement in the political participation and general posture of minority groups in Dallas.[1]

On appeal, the Court of Appeals reversed. 551 F. 2d 1043 (1977). Relying primarily on *East Carroll Parish School Bd.*

[1] As noted in the opinion of the District Court, the racial composition of the Dallas City Council in 1975 was two Negroes, one Mexican-American, and eight whites. 399 F. Supp. 782, 787 n. 5 (1975).

v. *Marshall,* 424 U. S. 636 (1976), and apparently drawing no distinction in this respect between court-ordered and legislatively enacted redistricting, the court held that absent unusual circumstances single-member districts are to be preferred. It concluded that no such circumstance existed. The case thereupon was remanded with instructions that the city redistrict itself into an appropriate number of single-member districts. A rehearing was denied, and a requested stay of mandate was refused.

II

Applicants level three charges of error at the judgment below. First, they contend that the Court of Appeals improperly ignored the distinctions drawn by this Court between state-enacted and court-ordered reapportionment plans. Applicants further argue that the court erroneously held that the city, in fashioning a remedy to correct unconstitutional dilution of the voting rights of one minority group, cannot consider the remedy's impact on other groups in the absence of an adjudication that the other groups' rights also were impaired unconstitutionally. Applicants' final claim is that the court below erred in failing to consider the city's need for some citywide representation.

This Court has declared repeatedly that the standards for evaluating the use of multimember and at-large voting plans differ depending on whether a federal court or a state legislative body initiated the use. *E. g., Chapman* v. *Meier,* 420 U. S. 1, 18 (1975); see *Connor* v. *Finch,* 431 U. S. 407, 414 (1977). When a federal court imposes a reapportionment plan upon a State, single-member districts are preferable in the absence of unusual circumstances. *East Carroll Parish School Bd., supra,* at 639. But "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds* v. *Sims,* 377 U. S. 533, 586 (1964). When the State accepts this responsibility, its decisions as to the most effective reconciling of traditional policies should not

be restricted beyond the commands of the Equal Protection Clause. *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966); cf. *Connor* v. *Finch*, *supra*, at 414–415. The Court of Appeals, by holding the Dallas City Council to the "unusual circumstances" test of *East Carroll Parish School Bd.*, appears to have confused these two standards.[2] While we have never explicitly held that municipal election plans are entitled to the same respect accorded those of state legislatures, there is reason to believe that they should be. We indicated as much in *Chapman* v. *Meier*, *supra*, at 27:

> "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." (Citing *Reynolds* v. *Sims*, *supra*.)

See also *Dusch* v. *Davis*, 387 U. S. 112, 116–117 (1967).

The two additional errors advanced by applicants also may have merit. The view of the court below that a plan's effect on various minority groups can be considered only after an adjudication of unconstitutional impairment as to those groups may be incompatible with the rationale of our recent decision in *United Jewish Orgs.* v. *Carey*, 430 U. S. 144 (1977).

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[2] The distinction is between a court-*ordered* plan, which may or may not have been proposed by a legislative body, and a court-*approved* plan, which has been initiated and promulgated as law by the legislative body. *East Carroll Parish School Bd.* involved the former, and this Court noted that "in submitting the plan to the District Court, the [police] jury did not purport to reapportion itself in accordance with the 1968 enabling legislation . . . , which permitted police juries and school boards to adopt at-large elections." 424 U. S., at 639 n. 6. Here, by contrast, "[t]he district court approved the City's plan for relief, which was enacted as a city ordinance following the court's decision that the prior system was unconstitutional." 551 F. 2d 1043, 1045 (CA5 1977). Thus, a rule of limited deference to local legislative judgments is appropriate in this case, for as we held in *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966), "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

See also *Gaffney* v. *Cummings*, 412 U. S. 735, 752–754 (1973).[3] Moreover, no apparent weight was given the express findings of the District Court with respect to the legitimate interest of the city in "having some at-large representation on [its] City Council." 399 F. Supp. 782, 795 (1975).[4] I had thought it clear that a federal court reviewing a reapportionment plan should consider and give appropriate weight to any valid state or municipal interest found to be furthered by the plan under consideration. See, *e. g.*, *Reynolds* v. *Sims*, *supra*, at 578–581. Citywide representation appears to be such an interest. Cf. *Dusch*, *supra*; *Fortson* v. *Dorsey*, 379 U. S. 433, 438 (1965).

III

The general principles that guide a Circuit Justice with respect to stay applications are well settled. The judgment of the court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that court not to stay its judgment. Moreover, the party seeking a stay bears the burden of advancing persuasive reasons why failure to grant could lead to irreparable harm. In light of the foregoing considerations, the Circuit Justice must make a judgment whether there is a "reasonable probability that four members of the Court will consider the issue sufficiently

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[3] The opposition to the new plan of certain Mexican-American voters does not render the District Court's findings in this respect automatically invalid. Those intervenors were never certified as the representatives of any class.

[4] After alluding to the evidence and to the concession by the plaintiffs (who themselves had proposed a plan involving the citywide election of the member of the Council designated as Mayor), the District Court found: "The Court believes and so finds that there is a legitimate governmental interest to be served by having some at-large representation on the Dallas City Council; that this governmental interest is the need for a city-wide view on those matters which concern the city as a whole, e. g., zoning, budgets, and city planning; and that three at-large members do not render the city's plan constitutionally infirm." 399 F. Supp., at 795 (footnote omitted).

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meritorious to grant certiorari." *Graves* v. *Barnes*, 405 U. S. 1201, 1203 (1972) (POWELL, J., in chambers).

I think there is a reasonable probability that at least four Members of the Court will vote to grant certiorari in this case. The case involves a major city that has adhered to its tradition of at-large elections since 1907.[5] As indicated above, the Court of Appeals may well have thought that the principles applicable to a state legislative redistricting did not apply with full force to such action by a city council. It also appears likely that established principles of general application in the redistricting cases were not applied correctly. Applicants also claim irreparable injury unless a stay is granted. Although the next regular election is not scheduled until April 1979, if the judgment of the Court of Appeals is not stayed, experience indicates that respondents will press promptly for a special election. In their response to this application, they comment that a stay "would unjustifiably prolong" an appropriate remedy. If the remedy ordered by the Court of Appeals were effectuated, the issues presented here probably would be mooted. In any event, in a situation of this kind the capacity of the incumbent Council to function effectively in the public interest may be impaired if the judgment is not stayed.

I will, therefore, enter an order recalling the mandate and staying the judgment of the Court of Appeals pending disposition of the petition for certiorari.

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[5] The District Court found:

"[A]t-large voting, especially on the municipal level has been an integral part of Texas local governments [since 1907 in Dallas] and . . . at large voting schemes have their genesis in reasons other than those racially motivated." *Id.*, at 797.

KRAUSE ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL.

ON APPLICATION FOR INJUNCTION AND/OR STAY

No. A–260. Decided September 16, 1977

Application for an injunction and/or stay of Court of Appeals' mandate, pending the filing of a petition for certiorari, for the purpose of stopping the construction of a gymnasium at Kent State University, is denied, where similar applications are pending in the District Court and Court of Appeals, both of which are in a position far superior to that of an individual Justice fairly to assess the merits of applicants' position.

See: 570 F. 2d 563.

MR. JUSTICE STEWART, Circuit Justice.

This is an application for an injunction and/or a stay of mandate of the United States Court of Appeals for the Sixth Circuit, pending the filing of a petition for certiorari in this Court. Its purpose is to secure from me, as Sixth Circuit Justice, an order stopping for the time being the construction of a gymnasium on a site at Kent State University in Ohio. The claim is that only such an order will prevent the obliteration of evidence necessary to a fair retrial of a lawsuit in which the applicants are plaintiffs.

Similar applications are now pending in the United States District Court for the Northern District of Ohio and in the United States Court of Appeals for the Sixth Circuit. Because of the intimate familiarity with the factual environment of this litigation acquired by those courts during the original trial and appeal, they are both now in a position far superior to that of an individual Justice of this Court fairly to assess the merits of the applicants' position.

Accordingly, the application is hereby denied, without

prejudice to the right of the applicants to continue to pursue similar relief in the District Court and/or the Court of Appeals, or to petition this Court for certiorari.

It is so ordered.

BARTHULI *v.* BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT

ON APPLICATION FOR STAY

No. A–247. Decided September 20, 1977

Application for stay, pending the filing of a petition for certiorari, of the California Supreme Court's judgment affirming a judgment denying applicant a writ of mandate to compel his reinstatement to an administrative position with respondent School District, is denied, where there is doubt whether certiorari would be granted, where applicant has not demonstrated that irreparable injury will result from denial of the stay, and where it is also doubtful whether a Circuit Justice has the power to grant the stay consistent with the Art. III limitations on his powers.

See: 19 Cal. 3d 717, 566 P. 2d 261.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Roger Barthuli seeks a stay of the judgment of the Supreme Court of California in the case of *Barthuli* v. *Board of Trustees*, 19 Cal. 3d 717, 566 P. 2d 261 (1977), pending his filing of a petition for writ of certiorari to review that judgment. The Supreme Court of California held that the applicant, who had an employment contract with the respondent School District as an associate superintendent of business, was not entitled to notice and a hearing before being discharged from that position. Although I am not entirely confident that four Justices of this Court will not vote to grant applicant's petition for certiorari when filed, my doubt on that score combined with the failure of applicant to demonstrate any irreparable injury has led me to deny the requested stay. I also have serious reservations whether the requested stay is consistent with the Art. III limitations on my powers.

Applicant, after being discharged, filed suit in the California courts seeking a writ of mandate reinstating him to his administrative position. The Supreme Court of California, by a vote of five to one, decided that applicant had no statutory

right to continue in his position as associate superintendent of business. It stated that he did have a statutory right to continue as a tenured classroom teacher and that the latter right could be enforced by writ of mandate; applicant, however, has never sought reinstatement as a classroom teacher. The Supreme Court of California further held that under California law an employee cannot obtain specific performance of an employment contract where he has an adequate remedy at law in an action for damages; the Supreme Court affirmed the finding of the lower court that applicant's damages action was adequate.

The relevant cases of this Court dealing with the due process rights of public employees discharged from their positions are *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Perry* v. *Sindermann,* 408 U. S. 593 (1972); *Arnett* v. *Kennedy,* 416 U. S. 134 (1974); and *Bishop* v. *Wood,* 426 U. S. 341 (1976). Examining the various views expressed in *Arnett, supra,* a majority of the Court might conclude that California's refusal to grant specific performance where there is an adequate remedy at law acts as a limitation upon the expectation of the employee in continued employment, which is a necessary condition to a constitutional claim under *Roth;* alternatively, a majority might conclude that the expectancy embraces the performance of the promise contained in the contract. For myself, I would adhere to the former view, and would be inclined to think that this is not one of the "rare" cases in which the "federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing." *Bishop* v. *Wood, supra,* at 349 n. 14. But I am not prepared to confidently assert that four of my colleagues might not think otherwise.

Applicant, in order to secure a "stay" of the judgment of the Supreme Court of California, must show not only a reasonable probability that certiorari will be granted in his case but also that irreparable injury will result in the event

that a stay is denied. The judgment of the Supreme Court of California simply affirmed a judgment of the Superior Court denying applicant a writ of mandate to compel his reinstatement as an associate superintendent of business in respondent School District. Obviously, a "stay" of the judgment of the Supreme Court of California will accomplish nothing whatever for applicant. He does not seek the extraordinary interim remedy of a mandatory injunction requiring his reinstatement to the position he previously held; he was dismissed from that position in 1973, his unsuccessful litigation in the state courts of California has apparently consumed the intervening four years, and in his application to me he expressly disavows any desire to "undo or alter" that dismissal.

A "stay" of the judgment of the Supreme Court of California such as applicant seeks would affect no present rights of either applicant or respondent. Given the Art. III limitation of our jurisdiction to "Cases" and "Controversies," I therefore have serious reservations whether the limited and abstract stay which applicant seeks is even within my power to grant. "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially" that this Court or Members thereof can take judicial action. *Texas* v. *ICC*, 258 U. S. 158, 162 (1922). A stay of the judgment of the Supreme Court of California in these circumstances would amount to nothing more than "a mere declaration in the air." *Giles* v. *Harris*, 189 U. S. 475, 486 (1903). See also *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–90 (1947); *Ashwander* v. *TVA*, 297 U. S. 288, 324 (1936).

I accordingly decline to issue the stay.

MECOM *v.* UNITED STATES

ON APPLICATION FOR REDUCTION OF BAIL PENDING APPEAL

No. A-222. Decided September 20, 1977

Application for reduction of allegedly excessive $750,000 bail pending applicant's appeal to the Court of Appeals from his conviction of conspiring to possess marihuana with intent to distribute it, is denied, where it appears that applicant was involved in a large-scale marihuana smuggling enterprise from Mexico; that his wife, a coindictee and his "connection" in Mexico, is a fugitive from justice there; that another associate in the enterprise is also a fugitive; that applicant and his associates were frequently in possession of large amounts of cash; and that he paid $100,000 for the murder—unsuccessfully attempted—of an associate suspected of cooperating with the authorities.

MR. JUSTICE POWELL, Circuit Justice.

This is an application for reduction of bail pending appeal to the Court of Appeals for the Fifth Circuit. Following a jury trial in the District Court for the Southern District of Texas, applicant was convicted of conspiracy to possess marihuana with intent to distribute it, in violation of 21 U. S. C. § 846. He was sentenced to five years' imprisonment to be followed by a special parole term of five years. Applicant's appeal from that conviction is pending in the Court of Appeals.

Before trial, bail was set at $1,000,000. Upon applicant's motion, this was reduced to $750,000. The District Court provided no statement of reasons for setting bail at so high an amount, despite the requirements of 18 U. S. C. § 3146 (d).[1]

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[1] Title 18 U. S. C. § 3146 (d) provides in pertinent part as follows:

"A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended

Bail was continued at the same amount pending appeal, and again no statement of reasons was provided, although one is required by Fed. Rule App. Proc. 9 (b).[2] The Court of Appeals denied applicant's motions for reduction of bail. Unable to raise the required amount, he remains incarcerated pending appeal.

Applicant argues that his bail has been set in an excessive and unreasonable amount, citing *Sellers* v. *United States*, 89 S. Ct. 36, 21 L. Ed. 2d 64 (1968) (Black, J., in chambers). He insists that neither the District Court nor the Court of Appeals made a specific finding that applicant would fail to appear. In particular, he alleges that he has substantial roots in the community, that he had never before been charged with a criminal offense, and that his interests in a local laundromat-grocery store and a shrimp boat business will serve to keep him from fleeing the jurisdiction.

Decisions of the District Court with respect to bail are entitled to "great deference." *Harris* v. *United States*, 404 U. S. 1232 (1971) (Douglas, J., in chambers). A Circuit Justice, however, has a responsibility to make an independent determination on the merits of the application. *Ibid.* Be-

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and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed."

See *United States* v. *Briggs*, 476 F. 2d 947 (CA5 1973) (defendants entitled to know reasons for imposition of conditions of release).

[2] Rule 9(b) provides as follows:

"(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion."

cause of the District Court's failure to adduce reasons for its decision,[3] it was necessary to obtain from the Government a response to applicant's allegations.[4]

According to the Government response, the evidence at trial indicated the following: Applicant was involved in a large-scale smuggling enterprise, which imported marihuana into Texas from Mexico in loads of 200 to 700 pounds; the marihuana was then distributed to locations as far away as Indiana; applicant's wife, a co-indictee, acted as his "connection" in Mexico and is currently a fugitive there; another associate in the enterprise is also a fugitive; and applicant and his associates were frequently in possession of large amounts of cash. The Government further states that at the bond hearing there was evidence that applicant paid $100,000 for the murder—unsuccessfully attempted—of an associate suspected of cooperating with the authorities.

Under these circumstances, there is certainly no reason to disturb the rulings of the courts below. Accordingly the application for reduction of bail is denied.

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[3] Applicant has raised no objection to the District Court's failure to provide a statement of reasons.

[4] Compliance with the requirements of § 3146 (d) and Rule 9 (b) not only facilitates review in this Court of bail decisions, but also may serve to focus the attention of the District Court upon the relevant elements of such decisions.

MINCEY *v.* ARIZONA

ON APPLICATION FOR STAY

No. A–302 (77–5353). Decided October 6, 1977

Where the Arizona Supreme Court reversed applicant's convictions on murder and assault counts because of erroneous jury instructions but affirmed his convictions on related drug counts, his application for stay, pending disposition of his pending petition for certiorari to review the drug convictions, of his second trial on the murder and assault counts, based on claims that illegally obtained evidence will be admitted at the second trial, is denied, since such claims must be asserted through normal post-trial review procedures.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant was convicted of murder, assault, and related drug offenses growing out of an incident which occurred at an apartment leased by him in Tucson, Ariz. The Supreme Court of Arizona reversed the murder and assault convictions because of erroneous jury instructions, but affirmed the judgments of conviction on the drug counts. Applicant now requests a stay of his second trial on the murder and assault counts, presently scheduled to take place on November 4, for the reason that evidence which he claims was obtained in violation of his rights under the United States Constitution will be admitted at that trial. The evidence in question was found by the Supreme Court of Arizona to have been properly admitted in his first trial, but applicant is seeking review of that determination in a petition for certiorari presently pending before this Court. He asks that the stay of his retrial be effective until his petition for certiorari is finally disposed of here.

The petition for certiorari is less than precise as to how much of the judgment of the Supreme Court of Arizona applicant wishes this Court to review. I think his constitutional claims with respect to the admission of evidence at his trial can be reviewed here only insofar as they pertain to those con-

victions affirmed by the Supreme Court of Arizona (the drug counts). Indeed, the application does not seek a stay of the judgments affirming those convictions, but refers only to the murder and assault counts. Since the judgments of conviction on those counts have been reversed by the Supreme Court of Arizona, they are not final under 28 U. S. C. § 1257. But the constitutional claims which applicant seeks to assert in his petition for certiorari are, so far as I can tell, common to all counts. I assume for purposes of this motion that reversal by this Court of applicant's convictions on the drug counts would require reversal of a conviction obtained on the retrial of the murder count if the same evidence were admitted in that proceeding.

I find it unnecessary to engage in the usual speculation as to whether the petition will commend itself to four Justices of this Court, because I think that even if the petition is granted the present application should be denied. The federal constitutional right asserted by applicant is not one such as is conferred by the Double Jeopardy Clause of the Fifth Amendment where the protection extends not only to incarceration following trial in violation of the prohibition but to the subjection of the defendant to a second trial at all. Applicant's constitutional claims are based on constitutional prohibitions against the admission of certain evidence at trial, and will be sufficiently vindicated if he be freed from incarceration as a result of a conviction had in reliance on such evidence. Such claims must be asserted through normal post-trial avenues of review. Cf. *Younger* v. *Harris*, 401 U. S. 37 (1971); *Stefanelli* v. *Minard*, 342 U. S. 117 (1951).

I therefore conclude that even though this Court were to grant the petition for certiorari to review applicant's conviction on the drug counts, he would not be entitled to have his presently scheduled trial in the Arizona court stayed pending our determination of the merits of the claims made in the petition. I accordingly deny his motion to stay the trial.

NEW MOTOR VEHICLE BOARD OF CALIFORNIA *v.* ORRIN W. FOX CO. ET AL.

ON APPLICATION FOR STAY

No. A–451. Decided December 6, 1977

Application to stay District Court's judgment enjoining enforcement of the provisions of the California Automobile Franchise Act relating to the establishment and relocation of franchised motor vehicle dealerships on the ground that such enforcement violated the Due Process Clause of the Fourteenth Amendment, is granted, pending the filing and disposition of a jurisdictional statement, on the condition that all orders required by the Act fixing the times and places of hearings on protests against relocation or establishment of dealerships shall be issued and served by applicant Board concurrently with the required notification to the franchisor. Statutes are presumptively constitutional and, absent compelling equities on the other side (which are not present here), should remain in effect pending a final decision on the merits by this Court.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant, the New Motor Vehicle Board of the State of California, has requested me to stay a judgment of the United States District Court for the Central District of California entered on October 19, 1977. That judgment enjoined enforcement of the California Automobile Franchise Act (Cal. Veh. Code Ann. §§ 3060–3069 (West Supp. 1977)), insofar as that Act's provisions relate to the establishment and relocation of franchised motor vehicle dealerships.

The pertinent provisions of the Act provide that before an automobile manufacturer or its proposed or existing dealer may establish a new dealership or relocate an existing one notice of such intention must be given to the Board and to all existing dealers for the "same line make" (direct competitors) within the "relevant market area." § 3062. Upon receiving such a notice any dealer may file within 15 days a protest against the proposed establishment or relocation, and

the Board is thereupon required to order the postponement of the establishment or relocation of the dealership pending hearing and final decision on the merits of the protest. Failure to comply with the order is a misdemeanor under California law, and can result in the suspension or revocation of the license of a manufacturer or dealer.

Upon receipt of a protest, the Board is also required to issue an order fixing a time for the hearing, which is to commence within 60 days following the order.[1] Without further elaborating the statutory proceedings relating to the hearing and ultimate decision of the Board, I am satisfied that the District Court correctly concluded that in the normal course of events manufacturers and dealers wishing to establish or relocate a franchise would be prevented from doing so for a period of several months during which the hearing is conducted and the Board renders its decision.

Respondents, General Motors Corp. and two Southern California retail automobile dealers, brought an action seeking to enjoin the enforcement of these provisions of the Act. The three-judge District Court granted the relief requested by these respondents, and expressed the view that "the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another" fell within the ambit of liberty interests protected by the Fourteenth Amendment. The court further concluded, citing *Fuentes* v. *Shevin*, 407 U. S. 67, 84–86 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); and *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950), that

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[1] It is unclear under the statute whether the same communication should contain both the order enjoining the proposed establishment or relocation of the dealership and the order setting the date of the hearing. In the case of one of the respondents in the instant action, the Board set the hearing date six weeks after issuing the injunction. The District Court, however, interpreted the statute to require the injunction and the order setting the hearing date to be promulgated concurrently.

under the Due Process Clause this "liberty" could be curtailed only after a hearing. Here, the court reasoned, since respondents were deprived of their "liberty" to move or establish a dealership for many months pending the Board's decision, enforcement of the statute occasioned a "gross violation of the Due Process Clause of the Fourteenth Amendment." [2]

Upon consideration of the application and the response, I have decided that the stay should be granted conditioned as hereinafter indicated. Because the case presumably will be coming to us by appeal and will therefore be within our obligatory jurisdiction, I feel reasonably certain that four Members of the Court will vote to note probable jurisdiction and hear the case on the merits, and I am also of the opinion that a majority of the Court will likely reverse the judgment of the District Court. Cf. *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers). It should not be necessary to add that neither of these matters can be predicted with anything like mathematical certainty, and the respondents for whom judgment is stayed are free to move the full Court to vacate a stay if they feel the Circuit Justice has miscalculated on these points.

I believe the District Court was wrong when it decided

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[2] The court also thought this statute permitted action distinguishable from that authorized in *Fahey* v. *Mallonee*, 332 U. S. 245 (1947) (statute permitting Government to summarily seize banks in serious financial difficulty), or *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594 (1950) (procedure for summary seizure of misbranded drugs by Government). Here there was no provision authorizing a public official to exercise discretion as to whether the public interest required immediate action, but rather the injunction automatically followed a protest by a competitor.

The court also thought the acts authorized under the statute differed from the act of a party obtaining a restraining order pending hearing. A party seeking a restraining order must make a persuasive showing of irreparable harm and likelihood of prevailing on the merits. No such showing was required of the competitor before his protest turned into an injunction under the statute.

that an automobile manufacturer has a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment to locate a dealership wherever it pleases, and was also wrong when it concluded that such a protected liberty interest could be infringed only after the sort of hearing which is required prior to ceasing a constitutionally protected property interest. Our cases in this difficult area do not offer crystal-clear guidance, and I venture my own analysis of the problem fully realizing that it is not apt to be the last word authoritatively spoken on the subject.

Meyer v. *Nebraska*, 262 U. S. 390, 399 (1923), did indeed state that the right to liberty guaranteed by the Due Process Clause included the right "to engage in any of the common occupations of life," and went on to say that such liberty could not be interfered with "under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competence of the State to effect." *Id.*, at 399–400. *Meyer*, I think, was what many would call a "substantive due process" case, where the legislature had flatly prohibited or limited a particular type of action without regard to individualized differences among potential actors. For example, five years after *Meyer* the Court held that the Due Process Clause prohibited States from limiting fees charged by employment agencies. *Ribnik* v. *McBride*, 277 U. S. 350 (1928). This decision was not based on any procedural defect in the statute, because the New Jersey statutory scheme made no provision for individualized determinations as to what fees might be charged; the statute by its terms set the limits, and no fact that could have been proved at a hearing would have been grounds under the statutory scheme for avoiding the limits imposed by the statute. The sort of substantive due process analysis embodied in cases such as *Ribnik*, *supra*, has long since faded from the scene, and that case itself was expressly overruled in *Olsen* v. *Nebraska*, 313 U. S. 236 (1941). While it may well

be that there remains a core area of liberty to engage in a gainful occupation that may not be "arbitrarily" denied by the State, I do not think that the claim to establish an automobile dealership whenever and wherever one chooses is within that core area. Prior to the enactment of the Act here in question, respondents were not restrained by state law of this kind from so doing, but the absence of state regulation in the field does not by itself give them a protected "liberty" interest which they may assert in a constitutional attack on newly enacted limitations on their previously unrestricted ability to locate a dealership.

The cases upon which the District Court specifically relied in concluding that the California Act was unconstitutional were, as noted above, *Fuentes, supra, Sniadach, supra,* and *Mullane, supra.* But all of these cases involved "property" interests found to be protected under the Due Process Clause against deprivation without prior hearing. There is no question that these cases state the law with respect to property interests such as were involved in them. But I cannot accept, and do not believe that a majority of this Court would accept, the proposition that respondents' "liberty" interest in establishing a car dealership was also a "property" interest which is protected against deprivation without prior hearing in the same manner as were the property interests involved in *Fuentes, supra, Sniadach, supra,* and *Mullane, supra.* The State of California was not seizing any existing tangible property interest of respondents by this Act; it was simply requiring them to delay establishment of a dealership on property which they presumably owned or leased or were in the process of buying or leasing until the Board considered and decided the protests against the proposed establishment. The suggestion that one has a right to conduct whatever sort of business he chooses from property he owns or leases was rejected at least as long ago as *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365 (1926); see *City of Eastlake* v. *Forest City Enterprises,*

Inc., 426 U. S. 668 (1976); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974).[3]

If California had by statute conferred upon automobile manufacturers and dealers the right to establish and relocate franchises wherever they chose, and then imposed a procedural hurdle such as the one here in question before the right could be effectuated, the case would be close to decisions such as *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), and *Bishop* v. *Wood*, 426 U. S. 341, 348–349 (1976). But the respondents had no such statutorily conferred entitlement or property right before the passage of this Act; they were free to locate their franchises where they chose, subject to state and local restrictions of differing kinds, simply because the State had not chosen to limit that freedom by legislation. When the State later decided to impose the limits here in question, and establish the hearing procedures which it did, I think it deprived respondents of neither "liberty" nor "property" within the meaning of the Fourteenth Amendment to the United States Constitution.[4]

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[3] Respondents also attack the statute on the grounds that it conflicted with the federal antitrust laws. The District Court did not pass upon this contention.

[4] The stated concerns which prompted enactment of the Act were "to avoid undue control of the independent . . . dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." 1973 Cal. Stats., ch. 996, § 1. This concern has prompted at least 18 other States to enact statutes which prescribe conditions under which new or additional dealerships may be permitted in the territory of the existing dealership. See Ariz. Rev. Stat. Ann. § 28–1304.02 (1976); Colo. Rev. Stat. § 12–6–118 (1974); Fla. Stat. § 320–642 (1975); Ga. Code § 84–6610 (f)(8), (10) (1975); Haw. Rev. Stat. § 437–28 (b)(22)(B) (Supp. 1975); Iowa Code § 322A.4 (Supp. 1977–1978); Mass. Gen. Laws Ann., ch. 93B, § 4 (3)(*l*) (West 1972 and Supp. 1977–1978); Neb. Rev. Stat. § 60–1422 (1974); N. H. Rev. Stat. Ann. § 357–B:4 (III)(*l*) (Supp. 1975); N. M. Stat. Ann. § 64–37–5 (P) (Supp. 1975); N. C. Gen. Stat. § 20–305 (5) (1975); R. I. Gen. Laws § 31–5.1–4

Respondents argue that the State is not injured by the injunction because the proposed relocations are almost invariably approved, and therefore even if the District Court was wrong on the merits a stay should not be granted. This argument casts too narrowly the purpose of the statute and the injury to the State, however. The interest of the State does not necessarily find expression through disapproval of relocation plans, but rather through the act of examining the proposed relocations to make sure that existing dealers are not being impermissibly harmed by the manufacturer and that the move is otherwise in the public interest. This interest is infringed by the very fact that the State is prevented from engaging in investigation and examination. And the occasion for this review may arise often during the time this injunction is in effect. In an affidavit presented to the District Court, Sam W. Jennings, Executive Secretary of the New Motor Vehicle Board, indicated that in the first 44 days following the issuance of the District Court's injunction, the Board received 99 notices of intent to relocate or establish new dealerships in California. Under the terms of the injunction, all those applicants will be allowed to locate dealerships without undergoing any scrutiny by the State. And assuming the State eventually prevails on the merits and the injunction is lifted, it is not at all clear that the New Motor Vehicle Board will have the authority to examine the propriety of all those relocations or to force those relocated dealerships to stop doing business. It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.

(C)(11) (Supp. 1976); S. D. Comp. Laws Ann. §§ 32-6A-3, 32-6A-4 (1976); Tenn. Code Ann. § 59-1714 (j) (1968); Vt. Stat. Ann., Tit. 9, § 4074 (c)(9) (Supp. 1977); Va. Code § 46.1-547 (d) (Supp. 1977); W. Va. Code § 347-17-5 (i) (Supp. 1977); Wis. Stat. § 218.01 (3)(f) (1957). Congress has also taken remedial action. See Automobile Dealer's Day in Court Act, 70 Stat. 1125, 15 U. S. C. §§ 1222-1225.

Respondents further argue that they are delayed in completing the necessary business arrangements for establishing or relocating, and this often results in losing the opportunity to locate in a particularly desirable spot. This irreparable injury outweighs any short-term interest the State has in enforcing the statute, they argue. While respondents' contentions are not completely without force, I am ultimately unpersuaded. Respondents may undergo some hardships because of the delay between the protest and the hearing, but the statute appears to minimize the delay, and the applicant appears to agree to abide by such a construction, at least for purposes of this stay. In its proposed stay order presented to the District Court applicant suggested a provision along the following lines:

> "FURTHER ORDERED that pending determination of said appeal, all orders required by California Vehicle Code section 3066, subdivision (a), fixing the times and places of hearings upon protests against relocation or establishment of dealerships shall be issued and served by defendant New Motor Vehicle Board concurrently with the notification required to be made by the Board to the franchisor under California Vehicle Code section 3062 . . . ."

They have indicated a willingness to have this same provision incorporated into a stay issued by me. Under these conditions, I think the hardship worked on respondents by the statutory scheme does not outweigh the damage done to the State by the injunction and therefore I grant the proposed stay on the terms described above. As I have said before, statutes are presumptively constitutional and, absent compelling equities on the other side, which I do not find in this case, should remain in effect pending a final decision on the merits by this Court. Cf. *Marshall* v. *Barlow's, Inc.*, 429 U. S. 1347, 1348 (1977) (REHNQUIST, J., in chambers).

It is therefore ordered that, pending applicant's timely filing and this Court's disposition of a jurisdictional statement, the injunction entered by the District Court for the Central District of California in this case on October 19, 1977, be and the same hereby is stayed. The stay order shall incorporate the above-quoted paragraph proposed by applicant to the District Court.

NATIONAL BROADCASTING CO., INC., ET AL. *v.* NIEMI, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM

ON APPLICATION FOR STAY

No. A–652. Decided February 10, 1978

Application to stay the commencement of the California Superior Court trial of a tort action in which applicants are defendants so that they may apply for a writ of certiorari in this Court to review, on federal constitutional grounds, the California Court of Appeal's judgment reversing the Superior Court's dismissal of the action and remanding for a trial is denied, absent a sufficient showing by applicants of irreparable injury resulting from the Court of Appeal's judgment if the stay is not granted.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have requested that I stay the commencement of a civil trial in the Superior Court of the City and County of San Francisco in which they are defendants in order that they may have an opportunity to apply for and obtain a writ of certiorari from this Court to review the judgment of the Court of Appeal of the State of California filed October 26, 1977. That court reversed the judgment of dismissal rendered by the Superior Court in a case wherein respondent sought damages from petitioners for injuries allegedly inflicted upon her by persons who were acting under the stimulus of observing a scene of brutality which had been broadcast in a television drama entitled "Born Innocent." Applicants contend that the First and Fourteenth Amendments to the United States Constitution prevent their being subjected to liability and damages in an action such as this, and intend to petition this Court for certiorari to review the judgment of the Court of Appeal remanding the case for trial.

I find it unnecessary to determine whether four Justices of this Court would vote to grant a petition for certiorari by these

applicants to review a California judgment sustaining a judgment for damages against them on the basis described above in the face of their claim that the First and Fourteenth Amendments prohibit the rendering of such a judgment. The only question before me is whether those same constitutional provisions would be thought by at least four Justices of this Court to call for the granting of a writ of certiorari to review the interlocutory judgment of the state Court of Appeal which did no more than remand the case for a trial on the issues joined. I am quite prepared to assume that the Court would find the decision of the Court of Appeal sought to be stayed a "final judgment" for purposes of 28 U. S. C. § 1257 (2) pursuant to its holding in *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975). But the mere fact that the Court would have jurisdiction to grant a stay does not dispose of all the prudential considerations which, to my mind, militate against the grant of the application in this case. Every year we grant petitions for certiorari or note probable jurisdiction in cases in which we ultimately conclude that a state or federal court has failed to give sufficient recognition to a federal constitutional claim, and have as a consequence reversed the judgment of such court rendered upon the merits of the action. But this is a far cry from saying that this Court would have stayed further proceedings in the same cases at an interlocutory stage comparable to the case now before me.

True, in the case of double jeopardy, we have held that the subjecting of the defendant to the second trial itself is a violation of the constitutional right secured by the Sixth Amendment, *Abney* v. *United States,* 431 U. S. 651, 660–661 (1977), even though any judgment of conviction rendered in that trial would be subject to ultimate reversal on appeal. The same doctrine is found in cases more closely resembling this such as *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974), and *Cox, supra.* But in both *Tornillo* and in *Cox* the First and Fourteenth Amendment claims were far more precisely

drawn as a result of the decisions of the state courts than is the case here. A reading of the opinion of the Court of Appeal indicates that it might have been based on a state procedural ground, by reason of the fact that the trial judge, himself, after denial of a motion for summary judgment but before the empanelment of a jury, viewed the entire film and rendered judgment for applicants because he found that it did not "advocate or encourage violent and depraved acts and thus, did not constitute an 'incitement.'" The Court of Appeal held that this was a violation of respondent's right to trial by jury guaranteed her by the California Constitution, and went on to state that:

> "[I]t is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been the responsibility of the trial court, or perhaps of this court on appeal, to determine upon a reevaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a 'constitutional fact.' (*Rosenbloom* v. *Metromedia, supra,* 403 U. S. 29, 54 . . . .)" *Olivia N.* v. *National Broadcasting Co., Inc.,* 74 Cal. App. 3d 383, 389, 141 Cal. Rptr. 511, 514 (1977).

The contours of California tort law are regulated by the California courts and the California Legislature, subject only to the limitations imposed on those bodies by the United States Constitution and laws and treaties enacted pursuant thereto. In the principal case relied upon by applicants in support of their stay, *United States* v. *Shipp,* 203 U. S. 563 (1906), "a sheriff allowed appellant to be lynched pending appeal to this Court of his conviction." A requirement to defend an action such as applicants are now required to defend in the Superior Court, and if unsuccessful there to post a supersedeas bond and prosecute their constitutional claims through the

normal appellate process to this Court, is scarcely a comparable example of irreparable injury. Since I find that applicants' claims of irreparable injury resulting from the judgment of the Court of Appeal in this case are not sufficient to warrant my granting their application, I accordingly deny the stay.

So ordered.

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upholding constitutionality of New York statute, as such decision was a final determination of federal constitutional issue and is ripe for appellate review under 28 U. S. C. § 1257 (2). New York v. Cathedral Academy, p. 125.

2. *Constitutionality of truck rate tariffs.*—Appeal challenging constitutionality of dump truck rate tariffs is dismissed without prejudice in view of intervening additional rate proceedings. California Dump Truck Owners Assn. v. California Public Utilities Comm'n, p. 9.

3. *Court of Appeals—Review of habeas corpus release order—Untimely appeal.*—Court of Appeals lacked jurisdiction to review District Court's habeas corpus order for state prisoner's release, where Corrections Director's motion for stay and evidentiary hearing was untimely under Fed. Rule Civ. Proc. 52 (b) or 59 and hence could not toll running of time limit for appeal under Fed. Rule App. Proc. 4 (a). Browder v. Director, Ill. Dept. of Corrections, p. 257.

4. *Habeas corpus release order—Finality.*—District Court's habeas corpus order for release of state prisoner issued without evidentiary hearing and based on habeas petition, "motion to dismiss," and state-court record, was final for purposes of 28 U. S. C. § 2253. Browder v. Director, Ill. Dept. of Corrections, p. 257.

5. *Reviewability of District of Columbia law.*—A law applicable only in District of Columbia is not a "statute of the United States" for purposes of 28 U. S. C. § 1257 (1), and hence District of Columbia Court of Appeals' decision holding unconstitutional provision of District of Columbia Code is not reviewable by appeal to this Court. Key v. Doyle, p. 59.

6. *State-court decision—Basis not disclosed.*—Where record does not disclose whether state-court decision appealed from was based on federal constitutional or adequate and independent state ground, judgment is vacated and case is remanded for further proceedings. Philadelphia Newspapers, Inc. v. Jerome, p. 241.

APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE IN HABEAS CORPUS PROCEEDINGS. See **Federal Rules of Civil Procedure.**

ARIZONA. See **Stays,** 4.

ARLINGTON COUNTY, VA. See **Constitutional Law,** IV, 2.

ATTORNEY'S FEES. See **Civil Rights Act of 1964,** 1.

AUTHORITY TO USE PEN REGISTERS. See **Federal Rules of Criminal Procedure; Omnibus Crime Control and Safe Streets Act of 1968.**

AUTOMOBILE DEALERS. See **Stays,** 7.

AVOIDANCE OF DOUBLE JEOPARDY PLEA. See **Criminal Law**, 2.

BAIL.

Reduction of bail.—Application for reduction of bail pending appeal of conviction for marihuana offense is denied. Mecom v. United States (POWELL, J., in chambers), p. 1340.

BANKS.

Venue of suit against national bank.—Under 12 U. S. C. § 94, venue for a state-court suit against a national bank need not be in county where bank's charter was issued but may be in county in which bank conducts its business at an authorized branch. Citizens & Southern Nat. Bank v. Bougas, p. 35.

BAN ON COMMUTER PARKING IN RESIDENTIAL AREAS. See **Constitutional Law**, IV, 2.

"BEST INTERESTS OF CHILD" STANDARD FOR ADOPTION. See **Constitutional Law**, III, 1; IV, 1.

BONA FIDE RETIREMENT PLANS. See **Age Discrimination in Employment Act of 1967**, 2.

BURDEN ON INTERSTATE COMMERCE. See **Constitutional Law**, I.

CALIFORNIA. See **Stays**, 7.

CAPITAL PUNISHMENT. See **Stays**, 4.

CARRIERS. See **Appeals**, 2; **Constitutional Law**, I, 2.

CASH MEAL ALLOWANCES FOR POLICE OFFICERS. See **Internal Revenue Code**, 2.

CHILDREN'S SOCIAL SECURITY BENEFITS. See **Constitutional Law**, IV, 3.

CHURCH-STATE ENTANGLEMENT. See **Constitutional Law**, V.

CITY COUNCILS. See **Stays**, 11.

CIVIL RIGHTS ACT OF 1871.

Interference with state prisoner's mail—Prison officials' immunity from liability.—In state prisoner's action under Act alleging negligent interference by prison officials with prisoner's outgoing mail in violation of his rights under First and Fourteenth Amendments, Court of Appeals erred in reversing summary judgment for officials granted on basis of their asserted qualified immunity from liability for damages under Act. Procunier v. Navarette, p. 555.

CIVIL RIGHTS ACT OF 1964.

1. *Employment-discrimination action—Prevailing defendant as entitled to attorney's-fees award.*—A prevailing defendant in an employment-dis-

CIVIL RIGHTS ACT OF 1964—Continued.

crimination action under Title VII of Act is entitled to attorney's-fees award under § 706 (k) only when action is frivolous, unreasonable, or without foundation, and here District Court did not abuse discretion in disallowing such fees to prevailing defendant-employer. Christiansburg Garment Co. v. EEOC, p. 412.

2. *Pregnancy leave—Denial of seniority.*—Employer's policy of denying employees returning from pregnancy leave their accumulated seniority violates § 703 (a) (2) of Title VII of Act. Nashville Gas Co. v. Satty, p. 136.

3. *Pregnancy leave—Denial of sick-leave pay.*—Employer's policy of not awarding sick-leave pay to pregnant employees is not a *per se* violation of Title VII of Act, but violation occurs if it is shown that policy is a mere "pretex[t] designed to effect an invidious discrimination against the members of one sex or the other." Nashville Gas Co. v. Satty, p. 136.

CLAYTON ACT. See **Antitrust Acts.**

CLEAN AIR ACT. See also **Stays**, 2.

1. *Criminal violation—"Emission standard"—Defense.*—A defendant may assert defense that "emission standard" with whose criminal violation he is charged under Act is not such a standard as Congress contemplated when it used term even though that standard has not previously been subjected to review procedure under § 307 (b) of Act. Adamo Wrecking Co. v. United States, p. 275.

2. *Dismissal of indictment—No violation of "emission standard."*—District Court, in dismissing indictment against petitioner under Act, did not err in holding that regulation that petitioner was charged with violating was not an "emission standard" within meaning of § 112 (c) of Act. Adamo Wrecking Co. v. United States, p. 275.

CLEAN AIR AMENDMENTS OF 1970. See **Clean Air Act.**

COMMERCE CLAUSE. See **Constitutional Law**, I.

COMMODITY FUTURES TRADING COMMISSION. See **Stays**, 13.

COMMUTER PARKING IN RESIDENTIAL AREAS. See **Constitutional Law**, IV, 2.

COMPACT CLAUSE. See **Constitutional Law**, I, 1; II.

CONDITIONS OF PROBATION. See **Federal Youth Corrections Act.**

CONFIGURATION OF TRUCKS. See **Constitutional Law**, I, 2.

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1871; Federal-State Relations; Procedure**, 2; **Stays**, 7.

I. Commerce Clause.

1. *Multistate Tax Compact.*—Multistate Tax Compact, which without congressional approval regulates member States' taxation of multistate

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businesses, is not invalid under Commerce Clause. United States Steel Corp. v. Multistate Tax Comm'n, p. 452.

2. *State regulation of truck size.*—Wisconsin regulations generally prohibiting double-trailer trucks from operating in State violate Commerce Clause. Raymond Motor Transportation, Inc. v. Rice, p. 429.

II. Compact Clause.

Multistate Tax Compact.—Multistate Tax Compact, which without congressional approval regulates member States' taxation of multistate businesses, is not invalid under Compact Clause. United States Steel Corp. v. Multistate Tax Comm'n, p. 452.

III. Due Process.

1. *Adoption of illegitimate child—Denial of unwed father's veto.*—Unwed father's substantive rights under Due Process Clause of Fourteenth Amendment were not violated by application, under Georgia's adoption laws, of "best interests of child" standard in denying him authority to prevent adoption of his illegitimate child. Quilloin v. Walcott, p. 246.

2. *Plea bargaining—Reindictment.*—Due Process Clause of Fourteenth Amendment is not violated where state prosecutor carries out plea bargaining threat to reindict accused on more serious charges if he did not plead guilty to original charge. Bordenkircher v. Hayes, p. 357.

IV. Equal Protection of the Laws.

1. *Adoption of illegitimate child—Standard for unwed father's veto.*—Under Georgia's adoption laws, equal protection principles do not require that unwed father's authority to veto adoption of his illegitimate child be measured by same standard as is applied to divorced father. Quilloin v. Walcott, p. 246.

2. *Ban on commuter parking.*—County zoning ordinance prohibiting commuter parking in designated residential neighborhoods does not violate Equal Protection Clause of Fourteenth Amendment. Arlington County Board v. Richards, p. 5.

3. *Disabled child's social security benefits.*—Social Security Act provisions terminating disabled dependent child's benefits upon marriage to individual not entitled to benefits, even though that individual is disabled, do not violate principle of equality embodied in Due Process Clause of Fifth Amendment. Califano v. Jobst, p. 47.

4. *Person with child-support obligations—Restriction on right to marry.*—Equal Protection Clause of Fourteenth Amendment is violated by Wisconsin statute restricting right to marry of state residents having child-support obligations. Zablocki v. Redhail, p. 374.

5. *Students' unemployment benefits.*—State statute denying unemploy-

CONSTITUTIONAL LAW—Continued.

ment benefits to day-school but not night-school students does not violate Equal Protection Clause of Fourteenth Amendment. Idaho Dept. of Employment v. Smith, p. 100.

V. Freedom of Religion.

Aid to sectarian schools.—New York statute authorizing reimbursement to sectarian schools for expenses already incurred in performing state-required services pursuant to another statute which had meanwhile been declared unconstitutional, violates First Amendment as made applicable to States by Fourteenth. New York v. Cathedral Academy, p. 125.

VI. Right To Counsel.

Corporeal identification.—Accused's Sixth Amendment right to counsel was violated at preliminary hearing on rape charge, where he was not represented by, or offered, counsel, and complaining witness identified him as her assailant pursuant to unnecessarily suggestive procedures. Moore v. Illinois, p. 220.

VII. Searches and Seizures.

1. *Ordering motorist out of car.*—Police officer's order to motorist to get out of his car, issued after he was lawfully detained for operating car with expired license plate, was reasonable and thus permissible under Fourth Amendment. Pennsylvania v. Mimms, p. 106.

2. *Search of motorist.*—Under standard announced in *Terry* v. *Ohio*, 392 U. S. 1, 21–22, police officer was justified in making search of motorist (whereby loaded revolver was found) once bulge in motorist's jacket was observed as he alighted from legally stopped car. Pennsylvania v. Mimms, p. 106.

CONSTRUCTION INDUSTRY. See **National Labor Relations Act.**

CONSTRUCTION OF GYMNASIUM. See **Stays**, 3.

CORPOREAL IDENTIFICATION OF ACCUSED. See **Constitutional Law**, VI.

COUNTIES. See **Constitutional Law**, IV, 2.

COURTS OF APPEALS. See **Appeals**, 3.

CRIMINAL INVESTIGATIONS. See **All Writs Act; Federal Rules of Criminal Procedure; Omnibus Crime Control and Safe Streets Act of 1968.**

CRIMINAL LAW. See also **Bail; Clean Air Act; Constitutional Law**, III, 2; VI; VII; **Federal Youth Corrections Act; Procedure**, 2; **Stays**, 4, 9, 10.

1. *Dismissal of indictment.*—District Court abused discretion in denying Government's motion to dismiss indictment charging offense arising out

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of same robbery of which petitioner had been convicted in state court. Rinaldi v. United States, p. 22.

2. *Mistrial ruling—"High degree" of necessity.*—Although state trial judge made no express finding of "manifest necessity" for mistrial based on defense counsel's prejudicial opening statement, record reflects "high degree" of necessity for mistrial ruling sufficient to avoid double-jeopardy plea. Arizona v. Washington, p. 497.

DALLAS, TEX. See **Stays**, 11.

DEATH PENALTY. See **Stays**, 4.

DEFENDANT'S RIGHT TO ATTORNEY'S-FEES AWARD. See **Civil Rights Act of 1964**, 1.

DENIAL OF CERTIORARI. See **Stays**, 4.

DENIAL OF UNEMPLOYMENT BENEFITS TO DAY-SCHOOL STUDENTS. See **Constitutional Law**, IV, 5.

DENIAL OF UNWED FATHER'S VETO OVER ADOPTION OF HIS CHILD. See **Constitutional Law**, III, 1; IV, 1.

DISABLED CHILDREN'S SOCIAL SECURITY BENEFITS. See **Constitutional Law**, IV, 3.

DISCOVERY. See **Stays**, 6.

DISCRIMINATION. See **Age Discrimination in Employment Act of 1967**, 2; **Civil Rights Act of 1964.**

DISMISSAL OF APPEAL. See **Appeals**, 2.

DISMISSAL OF INDICTMENT. See **Clean Air Act**; **Criminal Law**, 1.

DISPLAY OF SWASTIKA. See **Stays**, 8.

DISTRIBUTION OF APPRECIATED PROPERTY. See **Internal Revenue Code**, 1.

DISTRICT COURTS. See **All Writs Act**; **Civil Rights Act of 1964**, 1; **Criminal Law**, 1; **Federal Rules of Criminal Procedure**; **Habeas Corpus**; **Jurisdiction**, 2.

DISTRICT OF COLUMBIA. See **Appeals**, 5.

DIVERSITY JURISDICTION. See **Jurisdiction.**

DIVIDENDS-PAID DEDUCTIONS. See **Internal Revenue Code**, 1.

DOUBLE JEOPARDY. See **Criminal Law**, 2.

DOUBLE-TRAILER TRUCKS. See **Constitutional Law**, I, 2.

DUE PROCESS. See **Constitutional Law**, III; IV, 3; **Stays**, 7.

DUMP TRUCKS. See **Appeals**, 2.

ELECTIONS. See **Stays**, 11.

EMISSION STANDARDS FOR AIR POLLUTANTS. See **Clean Air Act.**

EMPLOYEES OF SUB-SUBCONTRACTOR AS PROTECTED BY MILLER ACT PAYMENT BOND. See **Miller Act.**

EMPLOYER AND EMPLOYEES. See **Age Discrimination in Employment Act of 1967**, 2; **Civil Rights Act of 1964**; **National Labor Relations Act**; **Stays**, 5.

EMPLOYMENT DISCRIMINATION. See **Age Discrimination in Employment Act of 1967**, 2; **Civil Rights Act of 1964.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, IV.

ERROR IN NOT ENTERTAINING CONSTITUTIONAL CLAIM IN HABEAS CORPUS PROCEEDINGS. See **Habeas Corpus.**

ESTABLISHMENT OF AUTOMOBILE DEALERSHIPS. See **Stays**, 7.

EVIDENCE. See **Stays**, 10.

EXCESSIVE BAIL. See **Bail.**

EXCESSIVE ENTANGLEMENT OF CHURCH AND STATE. See **Constitutional Law**, V.

EXCLUSIONS FROM GROSS INCOME. See **Internal Revenue Code**, 2.

EXHAUSTION REQUIREMENT IN HABEAS CORPUS PROCEEDINGS. See **Habeas Corpus.**

FAILURE OF RECORD TO DISCLOSE BASIS OF STATE-COURT DECISION. See **Appeals**, 6.

FAIR LABOR STANDARDS ACT. See **Stays**, 6.

FEDERAL RULES OF APPELLATE PROCEDURE. See **Appeals**, 3.

FEDERAL RULES OF CIVIL PROCEDURE. See also **Appeals**, 3.

Applicability in habeas corpus proceeding.—Habeas corpus is a civil proceeding, and hence Rules 52 (b) and 59 were applicable. Browder v. Director, Ill. Dept. of Corrections, p. 257.

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 41—Authorization to use pen register.—Rule 41 empowered District Court to authorize installation of pen registers for use in criminal investigation. United States v. New York Telephone Co., p. 159.

FEDERAL-STATE RELATIONS. See also **Criminal Law**, 1; **Constitutional Law**, I; II.

State injunction against federal actions.—State-court injunction against federal-court actions relating to state-court suit's subject matter conflicts with *Donovan* v. *City of Dallas*, 377 U. S. 408, and Supremacy Clause. General Atomic Co. v. Felter, p. 12.

FEDERAL TAXES. See **Internal Revenue Code**, 1.

FEDERAL YOUTH CORRECTIONS ACT.

Fine or restitution as condition of probation.—When a youth offender is placed on probation under § 5010 (a) of Act, restitution may be required, and, when otherwise applicable penalty provision permits, a fine may be imposed as a condition of probation. Durst v. United States, p. 542.

FEMALE EMPLOYEES. See **Civil Rights Act of 1964**, 2–3.

FIFTH AMENDMENT. See **Constitutional Law**, IV, 3.

FINAL JUDGMENT. See **Appeals**, 1.

FINAL ORDERS IN HABEAS CORPUS PROCEEDINGS. See **Appeals**, 4.

FINE AS CONDITION OF PROBATION. See **Federal Youth Corrections Act.**

FIRST AMENDMENT. See **Civil Rights Act of 1871**; **Constitutional Law**, V.

FOREIGN NATION'S RIGHT TO SUE UNDER FEDERAL ANTITRUST LAWS. See **Antitrust Acts.**

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1871**; **Constitutional Law**, III; IV, 1, 2, 4, 5; V; **Stays**, 7.

FOURTH AMENDMENT. See **Constitutional Law**, VII.

FRANCHISED AUTOMOBILE DEALERS. See **Stays**, 7.

FREEDOM OF RELIGION. See **Constitutional Law**, V.

FREEDOM TO MARRY. See **Constitutional Law**, IV, 4.

GEORGIA. See **Constitutional Law**, III, 1; IV, 1.

GOVERNMENT CONTRACTS. See **Miller Act.**

GUAM. See **Jurisdiction**, 2.

GYMNASIUMS. See **Stays**, 3.

HABEAS CORPUS. See also **Appeals**, 3, 4; **Federal Rules of Civil Procedure.**

Error in not entertaining constitutional claim.—In denying state prisoner habeas corpus relief, District Court erred in refusing to entertain, for

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failure to exhaust state remedies, prisoner's claim of constitutional error at his state trial, where claim had been raised in state appellate court though not referred to in its opinion affirming conviction. Smith v. Digmon, p. 332.

HARMLESS CONSTITUTIONAL ERROR. See **Procedure**, 2.

"HIGH DEGREE" OF NECESSITY FOR MISTRIAL. See **Criminal Law**, 2.

HIGHWAY TRAFFIC. See **Constitutional Law**, I, 2.

IDAHO. See **Constitutional Law**, IV, 5.

IDENTIFICATION OF ACCUSED. See **Constitutional Law**, VI.

ILLEGALLY OBTAINED EVIDENCE. See **Stays**, 10.

ILLEGITIMATE CHILDREN. See **Constitutional Law**, III, 1; IV, 1.

IMMUNITY OF STATE PRISON OFFICIALS FROM DAMAGES LIABILITY. See **Civil Rights Act of 1871.**

IMPROPER COMMENT BY DEFENSE COUNSEL. See **Criminal Law**, 2.

INCOME TAXES. See **Internal Revenue Code.**

INDICTMENTS. See **Clean Air Act**, 2.

INJUNCTIONS. See **Federal-State Relations; Stays**, 3, 8.

INTERFERENCE WITH PRISONERS' MAIL. See **Civil Rights Act of 1871.**

INTERNAL REVENUE CODE.

1. *Personal holding company—Appreciated property distribution—Dividends-paid deduction.*—Treasury Regulation provision that a personal holding company's distribution of appreciated property to its shareholders results, under §§ 561 and 562 of Code, in a dividends-paid deduction limited to adjusted tax basis of property, is valid. Fullman v. United States, p. 528.

2. *Taxability of cash meal allowance for police.*—Cash meal allowance for New Jersey state police officers is included in gross income under § 61 (a) of Code and is not subject to exclusion under § 119. Commissioner v. Kowalski, p. 77.

INTERSTATE COMMERCE. See **Constitutional Law**, I; II.

INTERSTATE COMPACTS. See **Constitutional Law**, I, 1; II.

IRREPARABLE INJURY. See **Stays**, 12.

JURISDICTION. See also **Appeals**, 1, 3–5; **Federal-State Relations.**

District Court of Guam—Diversity jurisdiction.—District Court of Guam is not authorized to exercise federal diversity jurisdiction. Chase Manhattan Bank v. South Acres Development Co., p. 236.

JURY TRIAL. See **Age Discrimination in Employment Act of 1967**, 1.

KENT STATE UNIVERSITY. See **Stays**, 3.

LABOR UNIONS. See **National Labor Relations Act.**

LENGTH OF TRUCKS. See **Constitutional Law**, I, 2.

LOST WAGES. See **Age Discrimination in Employment Act of 1967**, 1.

MAIL FROM PRISONERS. See **Civil Rights Act of 1871.**

MANDAMUS. See **Procedure**, 1.

"MANIFEST NECESSITY" FOR MISTRIAL. See **Criminal Law**, 2.

MARIHUANA OFFENSES. See **Bail.**

MARRIAGE. See **Constitutional Law**, IV, 4.

MARRIED CHILDREN'S SOCIAL SECURITY BENEFITS. See **Constitutional Law**, IV, 3.

MATERNITY LEAVE. See **Civil Rights Act of 1964**, 2–3.

MILLER ACT.

Payment bond—Protection of sub-subcontractor's employees.—Sub-subcontractor's employees were not protected by payment bond posted under Act by prime contractor, since they had no contractual relationship with either prime contractor or any subcontractor. J. W. Bateson Co. v. United States ex rel. Bd. of Trustees, p. 586.

MISTRIALS. See **Criminal Law**, 2; **Stays**, 9.

MOTIONS FOR CLARIFICATION OF JUDGMENT. See **Procedure**, 1.

MOTOR CARRIERS. See **Constitutional Law**, I, 2.

MOTOR VEHICLE DEALERS. See **Stays**, 7.

MULTIPLE PROSECUTIONS FOR SAME ACT. See **Criminal Law**, 1.

MULTISTATE TAX COMPACT. See **Constitutional Law**, I, 1; II.

NATIONAL BANKS. See **Banks.**

NATIONAL LABOR RELATIONS ACT.

Construction industry—"Prehire" agreement—Uncertified union's picketing.—Uncertified union's picketing to enforce "prehire" agreement with construction-industry employer constituted unfair labor practice under § 8 (b) (7) (C) of Act. NLRB v. Bridge Workers, p. 335.

NECESSITY FOR MISTRIAL. See **Criminal Law**, 2.

NEGLIGENT INTERFERENCE WITH PRISONERS' MAIL. See **Civil Rights Act of 1871.**

NEW JERSEY. See **Internal Revenue Code**, 2.

NEW YORK. See **Appeals**, 1; **Constitutional Law**, V.

NEW YORK CITY. See **Stays**, 2.

NONPUBLIC SCHOOLS. See **Constitutional Law**, V.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.

Authorization to use pen registers.—Title III of Act does not govern authorization of use of pen registers. United States v. New York Telephone Co., p. 159.

OUTGOING MAIL OF PRISONERS. See **Civil Rights Act of 1871.**

PAYMENT BONDS UNDER MILLER ACT. See **Miller Act.**

PEN REGISTERS. See **All Writs Act; Federal Rules of Criminal Procedure; Omnibus Crime Control and Safe Streets Act of 1968.**

PERSONAL HOLDING COMPANIES. See **Internal Revenue Code**, 1.

"PETITE" POLICY. See **Criminal Law**, 1.

PETITIONS FOR REHEARING. See **Stays**, 1.

PICKETING. See **National Labor Relations Act.**

PLEA BARGAINING. See **Constitutional Law**, III, 2.

POLICY AGAINST MULTIPLE PROSECUTIONS FOR SAME ACT. See **Criminal Law**, 1.

POLLUTION. See **Clean Air Act; Stays**, 2.

PRE-AGE-65 RETIREMENT PLANS. See **Age Discrimination in Employment Act of 1967**, 2.

PREGNANCY LEAVE. See **Civil Rights Act of 1964**, 2–3.

"PREHIRE" AGREEMENTS. See **National Labor Relations Act.**

PREJUDICIAL COMMENT BY DEFENSE COUNSEL. See **Criminal Law**, 2.

PRETRIAL IDENTIFICATION OF ACCUSED. See **Constitutional Law**, VI.

PREVAILING DEFENDANT'S RIGHT TO ATTORNEY'S-FEES AWARD. See **Civil Rights Act of 1964**, 1.

PRISONERS' MAIL. See **Civil Rights Act of 1871.**

PRISON OFFICIALS' IMMUNITY FROM DAMAGES LIABILITY. See **Civil Rights Act of 1871.**

PRISONS. See **Civil Rights Act of 1871.**

PRIVATE SCHOOLS. See **Constitutional Law**, V.

PROBATION. See **Federal Youth Corrections Act.**

PROCEDURE.

1. *Motion for clarification of judgment—Denial.*—Motion for clarification of this Court's judgment is denied without prejudice to filing of motion for leave to file a petition for a writ of mandamus to compel District Court to execute such judgment. Vendo Co. v. Lektro-Vend Corp., p. 425.

2. *Violation of right to counsel—Remand—Harmless error.*—Despite violation of accused's Sixth Amendment right to counsel at preliminary hearing, case will be remanded to determine whether failure to exclude evidence directly derived from such violation was harmless constitutional error. Moore v. Illinois, p. 220.

PROHIBITION AGAINST COMMUTER PARKING IN RESIDENTIAL AREAS. See **Constitutional Law**, IV, 2.

PROSECUTORIAL ERRORS. See **Stays**, 9.

QUALIFIED IMMUNITY OF STATE PRISON OFFICIALS FROM DAMAGES LIABILITY. See **Civil Rights Act of 1871.**

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964**, 1.

RATE TARIFFS. See **Appeals**, 2.

REDUCTION OF BAIL. See **Bail.**

REGULATION OF TRUCK LENGTHS AND CONFIGURATION. See **Constitutional Law**, I, 2.

REHEARINGS. See **Stays**, 1, 4.

REINDICTMENTS. See **Constitutional Law**, III, 2.

REINSTATEMENT OF EMPLOYMENT. See **Stays**, 5.

RELIGIOUS ESTABLISHMENT. See **Constitutional Law**, V.

RELOCATION OF AUTOMOBILE DEALERSHIPS. See **Stays**, 7.

REMAND. See **Procedure**, 2.

RESTITUTION AS CONDITION OF PROBATION. See **Federal Youth Corrections Act.**

RETIREMENT PLANS. See **Age Discrimination in Employment Act of 1967**, 2.

RETRIALS. See **Stays**, 9, 10.

RIGHT OF POLICE TO ORDER MOTORIST OUT OF CAR. See **Constitutional Law**, VII.

RIGHT TO COUNSEL. See **Constitutional Law**, VI; **Procedure**, 2.

RIGHT TO JURY TRIAL. See **Age Discrimination in Employment Act of 1967**, 1.

RIGHT TO MARRY. See **Constitutional Law**, IV, 4.

RULES OF APPELLATE PROCEDURE. See **Appeals**, 3.

RULES OF CIVIL PROCEDURE. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

RULES OF CRIMINAL PROCEDURE. See **Federal Rules of Criminal Procedure.**

RULES OF SUPREME COURT. See **Stays**, 1.

SCHOOL OFFICIALS. See **Stays**, 5.

SCHOOLS. See **Constitutional Law**, V.

SEARCHES AND SEIZURES. See **Constitutional Law**, VII.

SECOND TRIALS. See **Stays**, 9, 10.

SECTARIAN SCHOOLS. See **Constitutional Law**, V.

SENIORITY RIGHTS OF PREGNANT EMPLOYEES. See **Civil Rights Act of 1964**, 2, 3.

SEX DISCRIMINATION. See **Civil Rights Act of 1964**, 2, 3.

SICK-LEAVE PAY RIGHTS OF PREGNANT EMPLOYEES. See **Civil Rights Act of 1964**, 2, 3.

SINGLE-MEMBER ELECTION DISTRICTS. See **Stays**, 11.

SIXTH AMENDMENT. See **Constitutional Law**, IV; **Procedure**, 2.

SOCIAL SECURITY ACT. See **Constitutional Law**, IV, 3.

STANDING TO SUE. See **Antitrust Acts.**

STATE AID TO SECTARIAN SCHOOLS. See **Constitutional Law**, V.

STATE AND LOCAL TAXES. See **Constitutional Law**, I, 1; II.

STATE COURTS. See **Banks**; **Federal-State Relations.**

STATE POLICE TROOPERS. See **Internal Revenue Code**, 2.

STATE PRISONERS' MAIL. See **Civil Rights Act of 1871.**

STATE PRISON OFFICIALS' IMMUNITY FROM DAMAGES LIABILITY. See **Civil Rights Act of 1871.**

STATE REGULATION OF TRUCK LENGTHS AND CONFIGURATION. See **Constitutional Law**, I, 2.

STATE RESTRICTIONS ON RIGHT TO MARRY. See **Constitutional Law**, IV, 4.

STAYS.

1. *Abstention by Circuit Justice.*—In view of this Court's Rule 58, MR. JUSTICE MARSHALL abstains from acting on application for stay, pending rehearing petition, of Court's order vacating District Court's order and remanding for further proceedings in light of cases in which he dissented. Califano v. McRae (MARSHALL, J., in chambers), p. 1301.

2. *Clean Air Act implementation.*—Application for stay of Court of Appeals' judgment directing prompt implementation of New York City area transportation control plan under Clean Air Act is denied. Beame v. Friends of the Earth (MARSHALL, J., in chambers), p. 1310.

3. *Construction of gymnasium.*—Application for injunction or stay of Court of Appeals' mandate for purpose of stopping construction of gymnasium at Kent State University is denied. Krause v. Rhodes (STEWART, J., in chambers), p. 1335.

4. *Death penalty.*—Application for suspension of this Court's order denying certiorari on petition attacking constitutionality of Arizona death penalty statute or for stay of execution of such penalty is denied. Richmond v. Arizona (REHNQUIST, J., in chambers), p. 1323.

5. *Denial of school employment reinstatement.*—Application for stay of California Supreme Court's judgment affirming denial of writ of mandate to compel applicant's reinstatement to administrative position with school district is denied. Barthuli v. Board of Trustees (REHNQUIST, J., in chambers), p. 1337.

6. *Discovery orders.*—Church bodies' application for stay of District Court's discovery orders in action against them to enforce Fair Labor Standards Act is denied. Pacific Union Conf. of Seventh-Day Adventists v. Marshall (REHNQUIST, J., in chambers), p. 1305.

7. *Injunction against enforcement of automobile dealership statute.*—Application to stay District Court's injunction against enforcement of automobile dealership establishment and relocation provisions of California Automobile Franchise Act is granted. New Motor Vehicle Board v. Orrin W. Fox Co. (REHNQUIST, J., in chambers), p. 1345.

8. *Injunction against swastika display.*—Application for stay of state-court injunction against display of swastika is denied. National Socialist Party of America v. Village of Skokie (STEVENS, J., in chambers), p. 1327.

9. *Second criminal trial.*—Application for stay of second state criminal trial after first trial ended in mistrial because of prosecutorial error not in-

STAYS—Continued.

tentionally committed to provoke mistrial request is denied. Divans v. California (REHNQUIST, J., in chambers), p. 1303.

10. *Second criminal trial.*—Application for stay of retrial of state criminal prosecution pending certiorari is denied. Mincey v. Arizona (REHNQUIST, J., in chambers), p. 1343.

11. *Single-member election districts.*—Application for stay of Court of Appeals' judgment and for recall of its mandate requiring exclusive use of single-member districts in election of Dallas, Tex., City Council, is granted. Wise v. Lipscomb (POWELL, J., in chambers), p. 1329.

12. *Stay of state trial—Absence of irreparable injury.*—Stay of state tort trial, pending this Court's review, on federal constitutional grounds, of judgment reversing dismissal of action, is denied absent showing of irreparable injury if stay is not granted. National Broadcasting Co. v. Niemi (REHNQUIST, J., in chambers), p. 1354.

13. *Vacation of stays against enforcement of Commission regulation.*—Application to vacate Court of Appeals' stays preventing enforcement of Commodity Futures Trading Commission regulation is denied. Commodity Futures Trading Comm'n v. British American Commodity Options Corp. (MARSHALL, J., in chambers), p. 1316.

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1. *"Emission standard."* §§ 112 (b)(1)(B), (c), 307 (b), Clean Air Act, 42 U. S. C. §§ 1857c–7 (b)(1)(B), (c), 1857h–5 (b). Adamo Wrecking Co. v. United States, p. 275.

2. *"Final order."* 28 U. S. C. § 2253. Browder v. Director, Ill. Dept. of Corrections, p. 257.

3. *"Person."* § 4, Clayton Act, 15 U. S. C. § 15. Pfizer Inc. v. Government of India, p. 308.

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4. *"Statute of the United States."* 28 U. S. C. § 1257 (1). Key v. Doyle, p. 59.

5. *"Subcontractor."* § 2 (a), Miller Act, 40 U. S. C. § 270b (a). J. W. Bateson Co. v. United States ex rel. Bd. of Trustees, p. 586.

6. *"Subterfuge."* § 4 (f) (2), Age Discrimination in Employment Act of 1967, 29 U. S. C. § 623 (f) (2). United Air Lines, Inc. v. McMann, p. 192.

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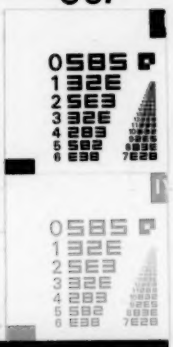
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